

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

JOINT APPENDIX

In the
UNITED STATES DISTRICT COURT
For the District of Columbia

No. 21,485

231

JAMES J. CASSIDY,
Appellant,

v.

WALTER N. TOBRINER, *ET AL.*,
Appellees.

*APPEAL FROM A JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA*

United States Court of Appeals
for the District of Columbia Circuit

FILED JAN 25 1968

Nathan J. Paulsen
CLERK

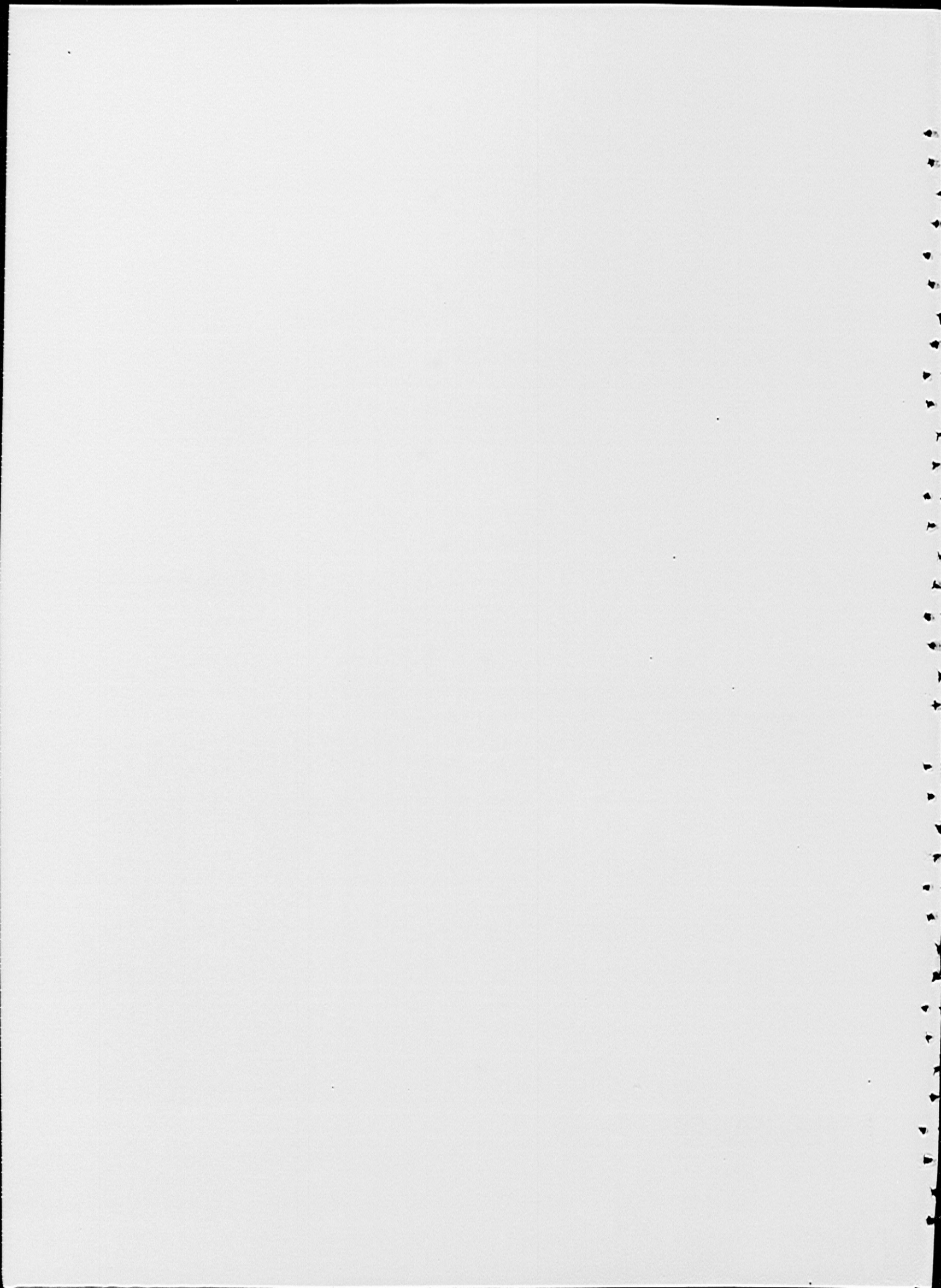


TABLE OF CONTENTS

Docket Entries	1
Complaint for Mandatory Injunction Directing Retirement of Police Officer for Disability Incurred While Performing Duty and Direct- ing Reversal of the Order Retiring Police Officer for Disability Not Incurred in Performance of Duty	2
Answer of Defendants Walter N. Tobriner, John B. Duncan and Charles M. Duke	6
Plaintiff's Motion for Summary Judgment	8
Affidavit of Carleton U. Edwards II	9
Plaintiff's Exhibit 1 , ...	13
Plaintiff's Exhibit 2A1	14
Plaintiff's Exhibit 2A2	15
Plaintiff's Exhibit 2B	16
Plaintiff's Exhibit 2C	17
Plaintiff's Exhibit 3A	18
Plaintiff's Exhibit 3B	18
Plaintiff's Exhibit 3C1	19
Plaintiff's Exhibit 3C2	19
Plaintiff's Exhibit 3D	19
Plaintiff's Exhibit 4A	20
Plaintiff's Exhibit 4B	21
Plaintiff's Exhibit 4C	22
Plaintiff's Exhibit 5A	23
Plaintiff's Exhibit 5B	24
Plaintiff's Exhibit 6A	25
Plaintiff's Exhibit 6B	26
Plaintiff's Exhibit 6C	27

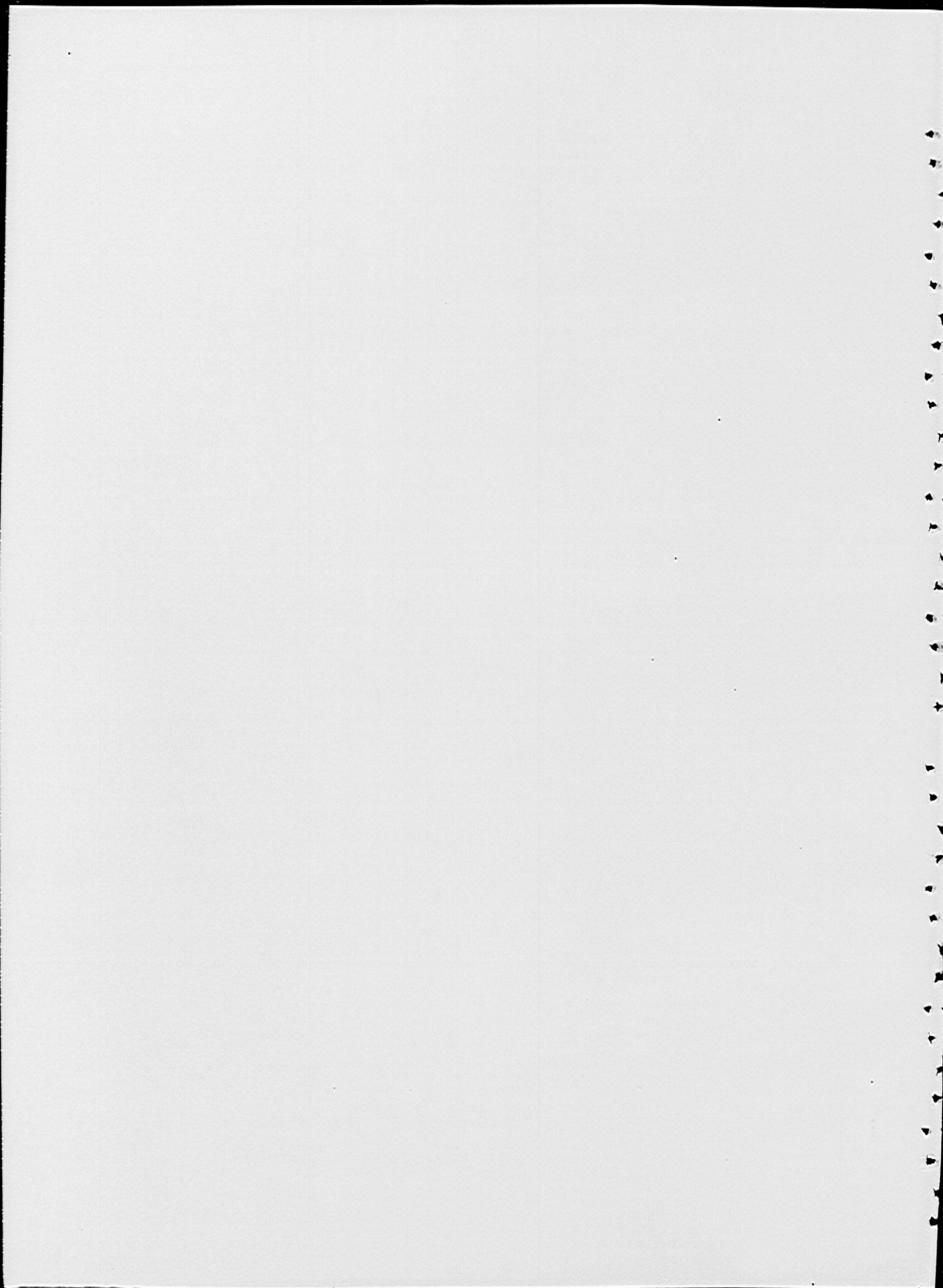


TABLE OF CONTENTS

Docket Entries	1
Complaint for Mandatory Injunction Directing Retirement of Police Officer for Disability Incurred While Performing Duty and Direct- ing Reversal of the Order Retiring Police Officer for Disability Not Incurred in Performance of Duty	2
Answer of Defendants Walter N. Tobriner, John B. Duncan and Charles M. Duke	6
Plaintiff's Motion for Summary Judgment	8
Affidavit of Carleton U. Edwards II	9
Plaintiff's Exhibit 1 , ...	13
Plaintiff's Exhibit 2A1	14
Plaintiff's Exhibit 2A2	15
Plaintiff's Exhibit 2B	16
Plaintiff's Exhibit 2C	17
Plaintiff's Exhibit 3A	18
Plaintiff's Exhibit 3B	18
Plaintiff's Exhibit 3C1	19
Plaintiff's Exhibit 3C2	19
Plaintiff's Exhibit 3D	19
Plaintiff's Exhibit 4A	20
Plaintiff's Exhibit 4B	21
Plaintiff's Exhibit 4C	22
Plaintiff's Exhibit 5A	23
Plaintiff's Exhibit 5B	24
Plaintiff's Exhibit 6A	25
Plaintiff's Exhibit 6B	26
Plaintiff's Exhibit 6C	27

(ii)

Plaintiff's Exhibit 7A, Proceedings Before the Police and Firemen's
Retirement and Relief Board, January 24, 1963:

Private James J. Cassidy	28
Dr. Maurice Mensh	29
Private James J. Cassidy (Resumed)	31

Plaintiff's Exhibit 7B, Proceedings Before the Police and Firemen's
Retirement and Relief Board, February 28, 1963:

Private James J. Cassidy	66
Plaintiff's Exhibit 7C	87
Plaintiff's Exhibit 7D	88
Plaintiff's Exhibit 8	89
Motion of Defendants for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment	90
Order	91
Notice of Appeal	91

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES J. CASSIDY
22 Wilcox Court
Alexandria, Virginia
Plaintiff

vs.

Civil Action No. 907-'64

WALTER N. TOBRINER
JOHN B. DUNCAN
CHARLES M. DUKE
Board of District of
Columbia Commissioners
District Building
14th & E Streets, N.W.
Washington, D. C.
Defendants

Docket Entries

1964

Apr. 16 Complaint, appearance, filed.
Apr. 16 Summons copies (3) and copies (3) of Complaint issued ser.
4-20-64
Oct. 12 First notice under Rule 13.
Nov. 10 Motion of pltf to stay Rule 13; c/m 11/10/64; MC 11/10/64,
filed.
Nov. 30 Order staying operation of Rule 13 to and including 2/1/64.
(N) Tamm, J.

1965

Jan. 29 Answer of defendants to complaint; c/m 1/29/65; appearance
Chester H. Gray, John A. Earnest and James M. Cashman,
filed.
Feb. 25 Motion of pltf to stay Rule 13; c/m 2/23/65; MC 2/25/65, filed.
Mar. 10 Order staying operation of Rule 13 to and including 6/1/65, (N)
Matthews, J.
Nov. 30 Motion of pltf to stay Rule 13 until 6/1/66; P&A's; c/m 11/29/65,
filed.

1966

- Jan. 5 Order staying Rule 13 to and including June 1, 1966. (N) McGarraghy, J.
- June 14 Motion of plttf. to stay operation of Rule 13; P&A's; c/m 6/10/66; filed.
- June 27 Order staying Rule 13 to and including January 1, 1967. (N) McGarraghy, J. filed.
- July 27 Motion of pltf for summary judgment; P&A; statement; c/m 7-26; filed.
- Aug. 25 Supplemental P&As of pltf in support of motion for Summary judgment; affidavit; Exhibits PX1, 2A, 2B, 2C, 3A, 3B, 3C, 3D, 4A, B&C, 5A and 5B, 6A, B&C, 7A, B&C and 8; statement; c/s 8/25/67 filed.

1967

- Sept. 1 Motion of defts for summary judgment; opposition to pltf's motion for summary judgment; exhibits A and B; P&A; M.C., filed.
- Sept. 1 Objection of defts to pltf's statement; and amended statement; defts' statement of material facts; c/m 9-1, filed.
- Oct. 18 Order granting motion of defts for summary judgment and denying pltf's motion for summary judgment. (N) AC/N, Sirica, J.
- Oct. 26 Notice of appeal of pltf; deposit by Edwards \$5.00 (copies mailed to Charles T. Duncan and John A. Earnest), filed.

[Filed Apr. 16, 1964]

COMPLAINT FOR MANDATORY INJUNCTION DIRECTING
RETIREMENT OF POLICE OFFICER FOR DISABILITY
INCURRED WHILE PERFORMING DUTY AND DIRECTING
REVERSAL OF THE ORDER RETIRING POLICE OFFICER
FOR DISABILITY NOT INCURRED IN PERFORMANCE
OF DUTY

1. Jurisdiction. The jurisdiction of this Court is based upon and invoked under Title 11, Section 306 of the D.C. Code (1961 Ed.) and under its general power and equitable jurisdiction in that this suit involves action on the part of the defendants in violation of the rights of the plaintiff which has,

and if not enjoined, will continue to cause him irreparable and incalculable damage.

2. Plaintiff. Plaintiff is a citizen of the United States, a resident of the State of Virginia, and was a member of the Metropolitan Police Department of the District of Columbia from May 1, 1951 until the date of his retirement for disability on February 28, 1963.

3. Defendants. The defendants, Walter N. Tobriner, John B. Duncan and Charles M. Duke, are all members of the Board of Commissioners of the District of Columbia and as such, among other things, supervise and control the aforementioned Metropolitan Police Department of the District of Columbia.

4. Plaintiff Incurred Disability in the Line of Duty. (Or became disabled as result of aggravation of condition in line of duty). Plaintiff was injured at various times while acting in line of duty as a member of the Metropolitan Police Department and in particular sustained back injuries on March 22, 1958, November 16, 1960, and July 15, 1961. As a result of said injuries, plaintiff was treated by members of the Board of Police and Fire Surgeons, a group of physicians under the control of the defendants and was, with the approval of the defendants, given "outside" medical examinations, x-rays, and care which was paid for by the defendants from public funds provided by law and was given excess sick leave beyond that permitted by law in the absence of injuries or conditions incurred in a line of duty, both of which actions on the part of the defendants would be illegal unless said sick conditions for which he was treated were incurred in line of duty. He was recommended for disability retirement by said Board of Police & Fire Surgeons and his condition was diagnosed as "traumatic arthritis of the lumbosacral region" by Dr. Esch, a member of said Board of Police & Fire Surgeons. Dr. Esch failed to express a definite opinion in his report of the causal connection between the aforementioned condition and plaintiff's performance of duty apparently as the result of defendants' reorganization of 47 and 31 as amended June 21, 1962 which illegally purport to change the provisions of an Act of the Congress of the United States, to wit, D.C. Code Title 4-529

which the defendants and their subordinates including the Board of Police and Fire Surgeons interpret as transferring from the Board of Police and Fire Surgeons to the Retirement Board the right to express a judgment as to the disability of a member such as the plaintiff from performing his duty in the department. Nevertheless, a member of said Board of Police and Fire Surgeons in testifying before the Retirement Board gave testimony which indicates clearly that plaintiff's disabling conditions were related to his performance of duty. Plaintiff sustained no injuries outside of duty of any consequence which contributed to the back condition mentioned above.

5. Action of the Retirement and Relief Board. As a result of plaintiff's aforementioned disability incurred in the line of duty, and as a result of the aforementioned recommendation of Board of Police and Fire Surgeons, he appeared before the Police & Firemen's Retirement and Relief Board for retirement, which, if granted on the basis of disability incurred in line of duty, would have resulted in plaintiff having been retired on the basis of 66-2/3% of his base salary at the time of retirement, the proceeds of which would not be subject to Federal or State income tax. At the hearing before said Retirement Board, testimony was offered which indicated plaintiff's aforementioned disability was incurred in performance of duty as a policeman. Nevertheless said Retirement Board ordered plaintiff retired for disability not incurred in line of duty as a result of which he was retired on the basis of 40% of his base salary at the time of retirement, the proceeds of which are subject to Federal and State income taxes.

6. Plaintiff's Appeal Rejected Commissioners. Thereafter, the plaintiff appealed the aforementioned order of the Retirement Board to the defendants contending in substance, among other things, that the actions of the Board was arbitrary and not supported by the evidence. Thereafter, the said defendant commissioners voted to sustain the action of the said Retirement Board retiring the plaintiff for disability not incurred in the line of duty.

7. Plaintiff's Irreparable Injury. As a result of the defendants' action as aforesaid, the plaintiff has been retired for disability not incurred in the line of duty, as a result of which he receives, in effect, instead of the amount

mentioned above, only 40% of his base pay at the time of retirement based on his service as a policeman, which will be subject to income taxes and plaintiff has been irreparably injured thereby. Plaintiff has done all that is required by law in order to receive the retirement annuity allocated to policemen who are retired due to disability incurred or aggravated in the performance of duty, but, nevertheless, the said annuity to which he is entitled has been denied him and he will continue to suffer this loss throughout the remaining years of his life and plaintiff has no other source of relief from defendants' action except by way of appeal to a Court of equity.

8. Defendants' Action Arbitrary. The defendants' action in sustaining the decision of the Retirement Board is completely arbitrary, unsupported by the evidence before the Board and before the defendants, and completely disregards the medical testimony of the Board of Police and Fire Surgeons of the District of Columbia.

WHEREFORE, plaintiff prays:

1. That the Court issue a Mandatory Injunction directing the defendants to reverse their aforementioned order directing the defendants to reverse the order of the Police and Firemen's Retirement and Relief Board ordering plaintiff retired for disability not incurred in line of duty, and directing the defendants to order plaintiff retired for disability incurred or aggravated during the performance of duty, effective as of February 28, 1963, and further directing the defendants to pay to plaintiff the difference between what he has been paid since February 28, 1963, and what he should have been paid if his retirement had been correctly designated, under Title 4, Section 527 of the District of Columbia, Code at the rate of 66-2/3% of his base pay as of February 28, 1963, said money to be paid to plaintiff in a lump sum.

2. That the Court grant such other and further relief as the nature of the case may require.

/s/ James J. Cassidy

DISTRICT OF COLUMBIA, ss:

James J. Cassidy, being first duly sworn, deposes and says that he has read the above complaint subscribed by him and verily believes that statements contained therein are true to the best of his knowledge and belief.

/s/ James J. Cassidy

Subscribed and sworn to before me this ____ day of April, 1964.

/s/ Jean A. West
Notary Public, D. C.

/s/ Bernard Margolius

/s/ Carleton U. Edwards, II
Attorney for Plaintiff

[Filed Jan. 29, 1965]

ANSWER OF DEFENDANTS WALTER N. TOBRINER,
JOHN B. DUNCAN AND CHARLES M. DUKE

First Defense

The complaint fails to state a claim against the defendants upon which relief can be granted.

Second Defense

1. Defendants admit that the Court has jurisdiction over the instant cause of action and deny the remaining allegations contained in paragraph numbered 1 of the complaint.

2. Defendants are without knowledge or information sufficient to form a belief as to the residence of plaintiff and admit the remaining allegations contained in paragraph numbered 2 of the complaint.

3. Defendants admit that they are members of the Board of Commissioners of the District of Columbia and make no response to the conclusions of the pleader contained in paragraph numbered 3 of the complaint. However, if response is required, the same are denied.

4. Defendants deny the allegations of the first two sentences of paragraph numbered 4 of the complaint; are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the third and eighth sentences of said paragraph, admit that plaintiff was treated by the Board of Police and Fire Surgeons for certain injuries incurred while plaintiff was on duty, admit that plaintiff received some medical treatment at private facilities which was paid for by public funds for that purpose, admits plaintiff received excess sick leave under the pertinent provisions of the Police Manual and admit that Victor H. Esch, M.D. on November 22, 1962, recommended that plaintiff, diagnosed by Dr. Esch as suffering from traumatic arthritis of the lumbosacral region, appear before the Police and Firemen's Retirement and Relief Board for consideration of retirement. Defendants make no response to the remaining allegations contained in paragraph numbered 4 of the complaint since they consist of conclusions, argument, and opinions of the pleader. However, if answer to such allegations is required, the same are denied.

5. Defendants deny the allegations contained in the first sentence of paragraph numbered 5 of the complaint, admit that some testimony before the Police and Firemen's Relief and Retirement Board was to the effect that plaintiff's disability was incurred in the line of duty, say that no substantial evidence establishing a service incurred disability was presented to said Board and admit that plaintiff was retired at 40% of his pay for disability not incurred in the line of duty. Defendants make no response to the conclusions contained in paragraph numbered 5 of the complaint.

6. Defendants admit the allegations contained in paragraph numbered 6 of the complaint.

7. Defendants admit plaintiff has been retired for disability not incurred in the line of duty as a result of which he receives approximately 40% of his base pay and make no response to the conclusions of the pleader contained in the first sentence of paragraph numbered 7 of the complaint. However, if response is required, the same are denied. Defendants deny the remaining allegations contained in said paragraph.

8. Defendants deny each and every allegation contained in paragraph numbered 8 of the complaint.

Further answering the complaint, the defendants deny all allegations not specifically admitted or otherwise answered, and deny all allegations of arbitrary, unreasonable, unlawful action.

Third Defense

Defendants say that their action sustaining the decision of the Police and Firemen's Retirement and Relief Board, retiring the plaintiff for disability not incurred in the performance of duty, is supported by substantial evidence and should not be overturned.

Chester H. Gray
Corporation Counsel, D. C.

John A. Earnest
Assistant Corporation Counsel, D.C.

James M. Cashman
Assistant Corporation Counsel, D.C.
Attorneys for defendants

[Certificate of Service]

[Filed July 27, 1967]

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The plaintiff moves the Court to enter Summary Judgment in his favor on the ground that consideration of the pleadings, including the verified complaint and other documents on file in this case, demonstrate that there is no genuine issue as to any material fact and that plaintiff is entitled to judgment as a matter of law.

/s/ Carleton U. Edwards, II
One Attorney for the Plaintiff

[Certificate of Service]

[Filed Aug. 25, 1967]

AFFIDAVIT OF CARLETON U. EDWARDS II

DISTRICT OF COLUMBIA, ss:

Carleton U. Edwards, II, being first duly sworn deposes and says as follows:

1. I am one of the attorneys for the above-named Plaintiff, James J. Cassidy, and have knowledge of the matters hereinafter referred to.

2. Certain documents are attached hereto as Exhibits, and all of them were either received from the District of Columbia Government or their representatives by Plaintiff's counsel and/or appear as part of said Plaintiff's official personnel or medical file maintained by the District of Columbia. Officer Cassidy's entire personnel and medical records were before the Retirement Board, as shown by PX 6A, page 2. The Exhibits, which are deemed pertinent to Plaintiff's Motion for Summary Judgment are as follows: ("Plaintiff's Exhibit" is abbreviated to "PX")

PX 1 (March 6, 1951) - A Board of . . . Surgeons medical survey report on Plaintiff showing him "OK for appointment".

PX 2A, 1 and PX 2A, 2 (1/16/52-11/13/62) - Officer Cassidy's "Master Sick Leave Card" showing various conditions for which he was treated at the Police and Fire Clinic and for which he received sick leave between January 16, 1952 and November 13, 1962.

PX 2B (11/16/60) - A "Report of Injury . . ." to Officer Cassidy "on duty" on 11/16/60 at the dog training center when he slipped and fell to the gravel surface, etc.

PX 2C (7/15/61) - A "Report of Injury . . ." to Officer Cassidy "on duty" which occurred on July 15, 1961 when he incurred an "acute lumbosacral strain" after jumping over an anchor fence with his police dog at the scene of the yoke robbery.

PX 3A (1/19/62) - A report of an X-ray examination on January 19, 1962 by Drs. Groover, Christie and Merritt reporting examination of the lumbosacral spine as showing ". . . straightening of the spinous nodes in a lateral view and there are minimal osteophytes . . ."

PX 3B (11/15/62) is a report of an X-ray examination by Drs. Groover, Christie and Merritt on November 15, 1962 of the lumbosacral spine.

PX 3C, 1 and 3C, 2 (9/24/62) are reports of an examination for rheumatoid disease on September 24, 1962 showing in part "negative for rheumatoid disease".

PX 3D (9/13/62) is a report of the Oscar B. Hunter Memorial Laboratory dated September 13, 1962 regarding Officer Cassidy indicating in part "anti-gamma globulin reaction-negative".

PX 4A (11/15/62) is a request from the Chairman of the Board of Surgeons to the Chief of Police dated November 15, 1962 requesting that Officer Cassidy be "directed to appear before the Board of . . . Surgeons" (all emphasis herein supplied).

PX 4B (11/16/62) is a Metropolitan Police Department form dated November 16, 1962 and November 19, 1962 indicating that Officer Cassidy was "notified to report" before the Board of Surgeons.

PX 4C (11/28/62) is a letter from the Retirement Board to the Chief of Police dated November 28, 1962 requesting the Chief of Police "to direct Private Cassidy to appear before the Police and Firemen's Retirement and Relief Board . . ." and indicating that Cassidy was so notified.

PX 5A (11/20/62) is a letter from Victor H. Esch, M.D., a member of the Board of . . . Surgeons to the Board of . . . Surgeons dated November 20, 1962 stating in substance that Officer Cassidy has been under his care and that it was his opinion that it would not be possible to rehabilitate Officer Cassidy for active police work and recommending his appearance before the Retirement Board for consideration of retirement with a diagnosis of "traumatic arthritis of the lumbosacral region".

PX 5B (11/20/62) is a Board of . . . Surgeons medical survey report on Officer Cassidy dated November 20, 1962 indicating "Arthritis Lumbosacral spine" and with a notation "findings and recommendations retirement-disability" and recommending the Officer's appearance before the Retirement Board for consideration of retirement.

PX 6A is a "Metropolitan Police Department - Sick Leave Certificate"

signed by Dr. Victor H. Esch indicating 34 days excess sick leave in 1962 and 12 days excess sick leave in 1963 with a diagnosis of "arthritis".

PX 6B is a "Metropolitan Police Department Report on Excess Sick Leave" dated March 6, 1963 showing a total excess sick leave of 44 days during the calendar year 1962, 34 days of which were for arthritis and was approved by the Board of Surgeons, the Chief of Police and bearing the stamp "Approved by the Commissioners of the District of Columbia sitting as a Board March 19, 1963".

PX 6C is a "Metropolitan Police Department Report on Excess Sick Leave 1963" of Plaintiff dated March 6, 1963 as showing total excess sick leave of 12 days apparently as of March 1, 1963, and approved by the Board of Surgeons, the Chief of Police and stamped "Approved by the Commissioners of the District of Columbia sitting as a Board, Mar. 19, 1963".

PX 7A (1/24/63) is a 33 page transcript of the proceedings of the Retirement Board on January 24, 1963 entitled "In re Disability Retirement of Private James J. Cassidy, 4th Precinct, Metropolitan Police Department".

PX 7B (2/28/63) is a 15 page transcript of proceedings before the Retirement Board on February 28, 1963 at the hearing continued from the previous hearing of 1/20/63 pertaining to Officer Cassidy's disability retirement.

PX 7C (2/28/63) is a Retirement Board Memorandum dated February 28, 1963 showing the vote of the members of the Retirement Board on Officer Cassidy's disability retirement and showing among other things that the "Chief Health and Examining Service, D.C." member of the Board (Dr. Arthur E. Cliff) voted for ". . . retirement for disability incurred as a result of duty".

PX 7D (3/11/63) is an order of the Retirement Board dated 3/11/63 ordering Plaintiff retired for disability not incurred or aggravated by the performance of duty as a policeman, effective from and after February 28, 1963.

PX 8 (2/28/64) is a letter from the Secretary of the Board of Commissioners, D.C. to Bernard Margolius as attorney for Officer Cassidy dated February 26, 1964 advising that the Commissioners had on February 12,

1964 voted to sustain the action of the Retirement Board retiring Officer
Cassidy for disability not incurred in or aggravated by performance of duty.

/s/ Carleton U. Edwards, II

[Jurat]

[Certificate of Service]

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Metropolitan Police Department

Washington, D. C.

BOARD OF POLICE AND FIRE SURGEONSMEDICAL SURVEY REPORT ON: CASSIDY: James JosephDate of Birth March 27, 1922 Date Appointed _____Age Last Birthday 28 Present Assignment _____General O.K.Mentality O.K.Weight 162 Height 68 1/2"Ishihara OK Vision 20/20 ColorblindHearing OK Heart OKTeeth Caries: Partial upper front. Teeth adequate Tonsils OKKidneys 4/17/51 Skin OKWasserman _____ Blood Pressure 122/70Digestion OKOrgans of Respiration OKMuscles and Articulations OKFINDINGS AND RECOMMENDATIONS: Temp. Refect O.K.4-17-51

NO SERVICE DISABILITY

Respectfully submitted,

Board of Police and Fire Surgeons

By Act

Secretary

Date: 1951

PRIVATE, MET. POLICE DEPT.

all neg - Sup. neg

CASSIDY

PLAINTIFF'S EXHIBIT 2A1

JA 14

Name CASSIDY: JAMES J.Date appointed MAY 1, 1951.

DATE REPORTED SICK	TIME	TOUR OF DUTY	DATE RETURNED TO DUTY	CLINIC VISITS	HOUSE VISITS	TOTAL DAYS ABSENT	TREATED FOR—	DOCTOR
1-16-52			1-28-52	3		9	Frac. 5th metacarpal right hand	Dr. Harrell
						1	cold	Reed
2-1-53			2-3-53	1		2	ac. Colitis	Dr. Reed
2-5-53			2-7-53	1		0	Cold	" "
4-7-53			4-11-53	1		2	"	" "
9-1-53			9-9-53	2		3	"	" "
12-11-53			12/13/53	1		1	"	" "
1-3-54			1-4-54	1		1	"	" "
1-18-54			1-20-54	1		1	Fecal inspection	" Dean
7-11-54			7-12-54	1		1	ac. Colitis	" Reed
9-4-54			9-8-54	2		4	Cold	" Campbell
7-19-55			4-23-55	1		2	"	" Reed
9-19-55			9-14-55	2		2	"	" "
12-16-55			12-21-55	2		4	Cold	" Reed
7-22-56			7-26-56	2		4	Cold	" "
10/15/56			10/17/56	1		1	Contusion to rt. leg on duty	" Dean
1/5/57			1/13/57	1		2	Cold	" Cloudy
5-11-57			5-15-57			4	"	" "
7-4-57			7-6-57	1		0	Diarrhea	" "
10-12-57			10-16-57			4	Cold	" "
11-16-57			11-18-57			2	U. R. I.	" "
2/8/58 1 1/2	T-F		2/13/58	2		5	Cold	" Cloudy
4/4/58 2 1/2	T-F		4/8/58	2		3	L. S. Shivers	" Dean
5/8/58 11 PM	T-F		5/8/58	1		1	Acute Colitis	" Cloudy
12/27/58 6 1/2	T-F		12/31/58	2		3	Diarrhea	" Cloudy

P. D. Form 51

P-306

CASSIDY, JAMES J.

Pvt

#4 Pct-

APPTD. 5/1/51

JA 15

APPTD. 5/1/51

METROPOLITAN POLICE DEPARTMENT
WASHINGTON, D. C.

Pct. No. 12-60-5436

P. D. No. 12-60-33 X

C. C. R. No. 81-193

X No. 4-60-33 X

REPORT OF INJURY TO MEMBER OF METROPOLITAN POLICE FORCE

Name of officer Pvt. James J. Cassidy Precinct Assigned 4th Pct.
11-16-60 detailed to AE-Training
Nature of injury Lacerations to face, left hand & left Division (Canine Corps)
knee Date of injury 11-16-60
Cause of injury fall on gravel surface On or off duty at time On duty

STATEMENT OF FACTS

(To be made by Precinct or Bureau Commander, after thorough investigation of officer's report. Definite statement to be made as to whether or not the injury was incurred in line of duty or in actual discharge of duty.)

James J. Cassidy, W-12-98, 22 Wilcox Ct., Virginia Hills, Alexandria, Va., phone No. SO 8-8661, a private in the Metropolitan Police Department, assigned to the Fourth Precinct and detailed to the AE-Training Division, (Canine Corps), reports that about 3:30 PM, Wednesday, November 16, 1960, while on duty at the dog training center at the National Training School, 2201 South Dakota Ave. N.E. and engaged in training, (running for a dog on the attack), I slipped and fell on the gravel surface causing lacerations to the face, left hand and left knee. To Police and Fire Clinic, Friday, November 18, 1960 and examined by Dr. Weller, no treatment necessary. Injury to Officer Report ordered by Dr. Harrell.

Witness: Pvt. William B. Corcoran

This injury was incurred on duty and in the actual performance of duty.

Signature (in ink)

Commanding Precinct.

FIRST INDORSEMENT.Date DEC 5 1960

To the Board of Surgeons for report as to the nature and extent of the injuries incurred by the officer.

Signature (in ink)

Executive Officer.

SECOND INDORSEMENT.Date 12/21/60

To the Executive Officer:

With report:

Seen by Dr. Harrell in clinic 11/18/60
for lacerations to face, left hand & left knee.

Signature (in ink)

Member Board of Surgeons.

PLAINTIFF'S EXHIBIT 2C

REPORT OF INJURY TO MEMBER OF THE METROPOLITAN POLICE FORCE		TYPE OF REPORT (CHECK) ☐ SUPPLEMENTARY ☒ ORIGINAL		P.D. FILE NO. 16.16894
NAME OF OFFICER (LAST, FIRST, INITIAL) Cassidy, James J.	RANK Private	UNIT Fourth Pct.	C.C.R. NO. 143-982	
NATURE OF INJURY Acute Lumbral Sacral Strain	DATE OF INJURY 7-15-61	DATE OF REPORT 7-25-61	PRECINCT NO. 10-61-5058	
CAUSE OF INJURY Jumping over an Anchor Fence	CHECK TWO: ☒ ON DUTY ☒ PERFORMANCE OF DUTY ☐ OFF DUTY ☐ NON-PERFORMANCE OF DUTY			
STATEMENT OF FACTS BY INJURED OFFICER (INCLUDE NAMES AND ADDRESSES OF ALL WITNESSES)				
About 12:30 A.M., Saturday, July 15th 1961, while detailed to the Canine Corps from the 4th precinct and working the 7:00 P.M. to 3:00 A.M. tour of duty at the tenth precinct, I responded to the scene of a yoke robbery at 3121 16th St., N.W. While conducting a track and a free search with my police dog "Wolf" inside the Powell playground located in the 3100 block of 16th St., N.W., it became necessary for me to jump over an anchor fence. As a result of this jump, I injured my back. I remained on duty but when the stiffness to my back persisted and pain developed, I reported to the Police and Fire Clinic on Tuesday, July 17, 1961 at 10:00 A.M. where I was examined and treated by Dr. Victor Esch of the clinic staff. He diagnosed my ailment as an acute lumbral sacral strain and ordered me on sick leave. I returned to duty on Monday, July 24, 1961.				
Witnesses: Leo L. Lyons 347 Boyd Avenue, Takoma Park, Maryland Cyril P. Carew 502 Beacon Road, Silver Springs, Maryland Lt. Israel J. Tew notified at 6:30 P.M., July 25, 1961.				
Instructions:		SIGNATURE OF INJURED OFFICER James J. Cassidy		
1. Injured officer must sign report unless incapacitated.		SIGNATURE OF CERTIFYING OFFICIAL Lt. Israel J. Tew		
2. Report to be investigated and contents certified by superior officer.		SIGNATURE OF COMMANDING OFFICER Alexander D. Douglas		
3. Submit original and two copies to Headquarters, retain one for Pct. personnel folder.		DATE 7-26-61		
4. Use reverse side if additional space is required.		SIGNATURE OF EXECUTIVE OFFICER Albert L. [Signature]		
First Indorsement: To the Board of Surgeons for report as to nature and extent of injury.		DATE JUL 26 1961		
Second Indorsement: To the Executive Officer: The following report relative to the nature and extent of above injury is submitted:		Acting Executive Officer		
Noted - as above - return to duty 7-24-61. No disability.				
SIGNATURE OF ATTENDING PHYSICIAN, MEMBER, BOARD OF SURGEONS Victor A. Esch, M.D.				DATE 7-28-61

[Plaintiff's Exhibit PX 3A]

WASHINGTON HOSPITAL CENTER
Department of Radiology
Drs. Groover, Christie and Merritt

Patient CASSIDY, JAMES JOSEPH Physician HARRELL/POLICE
Room No. OUT Age 39 Sex M Race W Hospital No. 21 66 73
Date 1/19/62

Examination of the lumbosacral spine shows no evidence of fracture or dislocation. There is some straightening of the spinous nodes in the lateral view and there are minimal osteophytes on the anterior margins of the bodies of the vertebrae. jew/eh
MSC 7211

[Plaintiff's Exhibit PX 3B]

WASHINGTON HOSPITAL CENTER
Department of Radiology
Drs. Groover, Christie and Merritt

Patient CASSIDY, JAMES J. Physician ESCH/POLICE
Room No. OUT Age 40 Sex M Race W Hospital No. 21-66-83
Date 11/15/62

Examination of the lumbo-sacral spine shows no fracture or dislocation. The intervertebral disc spaces and articular facets are preserved. There are minimal osteophytic changes of the lumbar spine. Both sacro-iliac joints appear normal.

Examination of the left knee shows no abnormalities of the bones or joints.

ga/tad

MSC 7211, 7304

[Plaintiff's Exhibit PX 3C-1]

FIRE AND POLICE DEPARTMENT CLINIC
1018 13th Street, N. W.
Washington 5, D. C.

Patients name James J. Cassidy

Address

Date 9/24/62

R

(Over)

Work-up for rheumatoid disease is negative.

Latex lexation test negative

Sed. rate law normal

Total Protein & Agravia negative

Uric acid has been normal 2 out of 3 times

[Plaintiff's Exhibit PX 3C-2]

5.5 mgm

8.9 mgm

4.35 mg

Anti gamma globulin reaction

Negative for rheumatoid disease.

[Plaintiff's Exhibit PX 3D]

OSCAR B. HUNTER MEMORIAL LABORATORY
Clinical Pathology and Pathologic Anatomy
915 - 19th Street, N.W.
Washington 6, D. C.

Received: September 1, 1962

Reported: September 13, 1962

REPORT OF ANTI-GAMMA GOBULIN
TEST FOR RHEUMATOID ARTHRITIS

Mr. James J. Cassidy

Lab No. 597381

Dr. Esch

Anti-gamma globulin reaction — NEGATIVE

Reported:
/s/ Illegible
Pathologist

PLAINTIFF'S EXHIBIT 4A

PERSONNEL PAPERS

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF POLICE AND FIRE SURGEONSRECEIVED
OFFICE OF THE
CHIEF OF POLICE
MET. POLICE DEPT.
NOV 15 11 54 AM '6211/15/62
(Date)TO: The Chief of Police
Metropolitan Police Department.

It is respectfully requested that Det. James J. Cassidy
 a member of the Metropolitan Police Department, D. C., attached
 to the 17th Pct be directed to appear before the Board
 of Police and Fire Surgeons at the Police and Fire Clinic
 on Tues. Nov. 20, 1962 at 10³⁰ A.M. for a
 physical examination in connection with his contemplated retirement.

B. F. Flemons
 Chairman
 Board of Police and Fire Surgeons

JGR

11/16/62
 noted
 Hb

RECEIVED
 NOV 16 1962
 DISTRICT OF COLUMBIA

PLAINTIFF'S EXHIBIT 4B

JA 21

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Metropolitan Police Department

Date: November 16, 1962

TO THE COMMANDING OFFICER,

FOURTH PRECINCT.

(Unit)

SUBJECT: Notification of a member of your command
to report to the Police and Fire Clinic.

You will notify Private James J. Cassidy of your command to
report to the Police and Fire Clinic at 10:00 A. M. on Tuesday,
(Day)
November 20, 1962, for physical examination in connection with
(Date)
retirement (disability).

Deputy Chief of Police
Acting Executive Officer

ab

Date: November 19, 1962

TO THE EXECUTIVE OFFICER

James J. Cassidy of this command was notified at
10:30 A. M. on Sunday November 18, 1962 to
(Day) (Date)
report to the Police and Fire Clinic in accordance with the above
directive.

Ralph L. Stines

Acting Commanding Fourth Precinct

(Precinct, Bureau or Division will retain duplicate copy for files)

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Metropolitan Police Department

November 28, 1962

TO: The Chief of Police

THRU: The Deputy Chief, Executive Officer

SUBJECT: Recommended retirement of Private James J. Cassidy, Fourth Precinct.

The Board of Police and Fire Surgeons has recommended the retirement of Private James J. Cassidy, Fourth Precinct. You are requested to direct Private Cassidy to appear before the Police and Firemen's Retirement and Relief Board at 1:30 P.M. Thursday, December 13, 1962, in Room 5114, Municipal Center Building.

Private Cassidy may be expected to demonstrate a connection between his official police duties and the disability which incapacitates him for further duty. He may present injury reports, statements of fellow officers and/or testimony of witnesses who have knowledge of the cause of his disability. He may be represented at this hearing by an attorney or other person of his own choosing, if he so desires.

The report of the Board of Police and Fire Surgeons and Private Cassidy's personnel file are available at the office of the Secretary, Retirement Board, Room 5080, Municipal Center, and he or his authorized representative may review same during office hours. If he does not wish to review the case in person, it is suggested that he contact the Secretary by phone (Ext. 303) to discuss the matter.

It is further requested that Private Cassidy be directed to initial this memorandum and return the original to the Secretary, Retirement Board.

For the Retirement and Relief Board:

Isabelle G. Olsen

Isabelle G. Olsen
Secretary

Initials

11-30-62-

Cassidy notified of change in time from 1:30 to 3:30 PM. 12/10
Phone No. 8-8061 - 22 Wilcox Ct., Alex. V.

[Plaintiff's Exhibit PX 5A]

November 20, 1962

TO: The Board of Police and Fire Surgeons:

RE: Private James J. Cassidy, a member of the Metropolitan Police Department - age - forty years, seven months, 24 days (3-27-22) service - eleven years, six months, nineteen days (5-1-51).

Private James J. Cassidy has been under my professional care since November, 1960. His chief complaints have been pain in his lower back and left knee, and generalized fatigue. He dates the onset of his symptoms to an injury which he incurred in the line of duty on November 16, 1960. Since that time he has complained of recurrent low back pain, which he states prevents him from performing his duties as a Police Officer. He again injured his back while on duty on July 15, 1961. During the past six months he has lost increasing amounts of time from duty due to this complaint.

It is my opinion that it will not be possible to rehabilitate Private Cassidy to active Police work. It is therefore recommended that he appear before the Retirement and Relief Board for consideration of retirement.

The diagnosis is traumatic arthritis of the lumbosacral region.

/s/ Victor H. Esch, M.D.
Member, Board of Police
and Fire Surgeons.

PD 302 PLAINTIFF'S EXHIBIT 5B

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Metropolitan Police Department
Washington, D. C.

BOARD OF POLICE AND FIRE SURGEONS

MEDICAL SURVEY REPORT ON: James J. Cassidy

Date of Birth March 27, 1922 Date Appointed May 1, 1951

Age Last Birthday 40 Present Assignment Private, #4

General OK

Mentality OK

Weight 190 Height 68 3/4

Ishihara OK Vision R 20/30 L 20/150

Hearing OK Heart OK

Teeth OK Tonsils OK

Kidneys OK Skin OK

Wassermann OK Blood Pressure 140/80

Digestion OK

Organs of Respiration OK

Muscles and Articulations Arthritis lumbosacral spine

FINDINGS AND RECOMMENDATIONS

RETIREMENT - DISABILITY

Recommend that this man
appear before the Retiring
Police Board for con-

SEAL OF THE DISTRICT OF COLUMBIA
BOARD OF POLICE AND FIRE SURGEONS
1013 13th STREET, N.W.
WASHINGTON 5, D. C.

Respectfully submitted,

BOARD OF POLICE AND FIRE SURGEONS

By

A. F. Dean
(Secretary)

November 20, 1962

PLAINTIFF'S EXHIBIT 6A

NAME (LAST-FIRST-INITIAL)		PRECINCT	ASSIGNMENT
CASSIDY, James J		4 th	Footman
HOME ADDRESS			DOCTOR
22 Wilcox Ct., Alex., Va.			Esch
TIME & DATE REPORTED SICK	TOUR OF DUTY	DAYS OFF	PRIOR DAYS SICK
5:30 AM 11-13-62	12-8	Thur-Fri	40
DATE TO REPORT TO CLINIC	SIGNATURE OF COMMANDING OFFICER		
11-16-62	<i>William L. Richardson</i>		
TOUR OF DUTY FROM DATE TO DATE	NO. OF DAYS ALLOWED	NO. OF DAYS DISALLOWED	
11-13-62 to 11-16-62	62-34		
DIAGNOSIS	HOME VISITS	CLINIC OR OTHER VISITS	
<i>Heart Throat</i>	for 1962 10 44	for 1963 12	
CLERK NOTIFIED OF RETURN	SIGNATURE OF MEMBER OF BOARD OF SURGEONS		
	<i>Victor H. Esch</i> M.D.		
METROPOLITAN POLICE DEPARTMENT—SICK LEAVE CERTIFICATE			
PD 78 (11-1-59) Signatures need only show on original			

PLAINTIFF'S EXHIBIT 6B

10-1-52

DEPARTMENT OF THE DISTRICT OF COLUMBIA
Metropolitan Police Department

Report on Excess Sick Leave

File: 161.4613/3

PVT. JAMES J. CASSIDY
Name

Date: March 6, 1963

To the Board of Surgeons:

The records indicate sick absenteeism during the current calendar year as follows, in the case of the above named officer:

Date Sick	Days	Diagnosis	Date Sick	Days	Diagnosis
1-16-62	8	Grippe			
6-9-62	8	Rheumatoid disease of Lumbo Sacral region			
7-14-62	5	Grippe			
8-24-62	10	Rheumatoid arthritis			
9-21-62	5	Observation			
10-20-62	4	Grippe			
11-13-62	34	Arthritis (VHE) 0.2.			

NOTE: This officer retired March 1, 1963.

Total days absent 74 Total Excess 44 Previously allowed 10

The Board will submit report and recommendation as to allowance of pay.

By Direction of the Chief of Police:

S' Howard Correll
Executive Officer

Date

To the Chief of Police:

The Board is of the opinion that the sick absenteeism of the above named officer was a direct consequence of injury received (or disease contracted) in actual performance of duty, as contemplated under the provisions of Section 9, Chapter XXXIV, of the Police Manual, and not due to or complicated by vicious habits or carelessness.

The Board therefore recommends allowance of pay for period indicated.

MAR 15 1963

MAR 15 1963

M. F. Phelan Jr.
Chairman, Board of Surgeons

Date

To the Commissioners, D. C.:

This appears to be a case coming within the purview of that provision of the Police Manual authorizing the extension by the Commissioners of sick leave in excess of thirty days. I therefore concur in the recommendation of the Board of Surgeons that pay be allowed 34 days excess sick leave in the case of

Pvt. James J. Cassidy
Name

Chief of Police
Chief of Police

PLAINTIFF'S EXHIBIT 6C

JA 27

PERSONNEL PAPERS

PD 319
10-1-52DEPARTMENT OF THE DISTRICT OF COLUMBIA
Metropolitan Police DepartmentReport on Excess Sick Leave
1963

File: 161.4708

PVT. JAMES J. CASSIDY
Name

Date: March 6, 1963

To the Board of Surgeons:

The records indicate sick absenteeism during the current calendar year as follows, in the case of the above named officer:

Date Sick	Days	Diagnosis	Date Sick	Days	Diagnosis
(Carried)					
11-13-62	42	Arthritis (VHE) U.S.			

RECEIVED BY THE COMMISSIONERS OF THE DISTRICT OF COLUMBIA SITTING AS A BOARD
MAR 19 1963

NOTE: This officer retired March 1, 1963.

SECRETARY

Total days absent 42 Total Excess 12 Previously allowed 0

The Board will submit report and recommendation as to allowance of pay.

By direction of the Chief of Police:

Executive Officer

Date 3/18/63
To the Chief of Police:

The Board is of the opinion that the sick absenteeism of the above named officer was a direct consequence of injury received (or disease contracted) in actual performance of duty, as contemplated under the provisions of Section 9, Chapter XXXIV, of the Police Manual, and not due to or complicated by vicious habits or carelessness.

The Board therefore recommends allowance of pay for period indicated.

MAR 17 1963

MAR 17 1963

MAR 17 1963

Date
To the Commissioners, D. C.:

Chairman, Board of Surgeons

This appears to be a case coming within the purview of that provision of the Police Manual authorizing the extension by the Commissioners of sick leave in excess of thirty days. I therefore concur in the recommendation of the Board of Surgeons that pay be allowed 12 days excess sick leave in the case of

Pvt. James J. Cassidy

Chief of Police

[Plaintiff's Exhibit PX 7A]

P.D. 4696

BEFORE THE POLICE AND FIREMEN'S
RETIREMENT AND RELIEF BOARD

January 24, 1963.

IN RE: Disability retirement of Private James J. Cassidy,
Fourth Precinct, Metropolitan Police Department.

THE BOARD:

Clyde C. Richardson, Deputy Chief, Administration & Safety Division, Acting Chairman.

Lyman J. Umstead, Assistant Corporation Counsel, D.C.

Dr. Arthur E. Cliff, Chief, Health & Examining Service, D.C.

John R. Barry, Chief Instructor, D. C. Fire Department.

Albert L. Embrey, Deputy Chief, Metropolitan Police Department.

PRESENT:

Dr. Maurice Mensh, Member, Board of Police and Fire Surgeons.

Mr. Bernard Margolius, Attorney, 1000 Vermont Avenue, N. W.,
representing Pvt. James J. Cassidy.

PRIVATE JAMES J. CASSIDY

Testified under oath as follows:

Mr. Richardson: Mr. Cassidy, would you give to the Board your full name and address?

Pvt. Cassidy: James Joseph Cassidy, 22 Wilcox Court, Alexandria, Virginia.

Mr. Richardson: Mr. Cassidy, you have before the Board an application for disability retirement. According to the records we have before us, you were born March 27, 1922; your age is 40 years; you were appointed May 1, 1951; you now have service of 11 years and 9 months; you have previous service in the United States Army from 10-15-40 to 9-20-45; is that correct?

Pvt. Cassidy: Yes.

Mr. Richardson: Dr. Mensh, will you give us the report, please?

DR. MAURICE MENSCH

Testified under oath as follows:

Dr. Mensh: "Private James J. Cassidy a member of the Metropolitan Police Department, age forty years, seven months, 24 days service; eleven years, six months, nineteen days (5-1-51)."

Private Cassidy has been under the care of Dr. Victor Esch since November of 1960.

"His chief complaints have been pain in his lower back and left knee, and generalized fatigue. He dates the onset of his symptoms to an injury which ~~we~~ incurred in the line of duty on November 16, 1960. Since that time [2] he has complained of recurrent low back pain, which he states prevents him from performing his duties as a Police Officer. He again injured his back while on duty on July 15, 1961. During the past six months he has lost increasing amounts of time from duty due to this complaint."

It is Dr. Esch's opinion "that it will not be possible to rehabilitate Private Cassidy to active Police work. It is therefore recommended that he appear before the Retirement and Relief Board for consideration of retirement.

The diagnosis is traumatic arthritis of the lumbosacral region."

There are appended x-ray reports. One is dated January 19, 1962, "examination of the lumbosacral spine shows no evidence of fracture of dislocation. There is some straightening of the spinous nodes in the lateral view and there are minimal osteophytes on the anterior margins of the bodies of the vertebra."

Here is another dated November 15, 1962. "Examination of the lumbosacral spine shows no fracture or dislocation. The intervertebral disc spaces and articular facets are preserved. There are minimal osteophytic changes of the lumbar spine. Both sacro-iliac joints appear normal. Examination of the left knee shows no abnormalities of the bones or joints."

There is a note on the back that he was worked up for rheumatoid arthritis and the tests for rheumatoid arthritis were negative. Also tests for gout were negative two out of three times. I don't see the incidentals here.

Deputy Chief Embrey: I have them here. Do you want to see them, Dr. Mensh?

Dr. Mensh: No, I just want to see that they are there.

Dr. Cliff: Well, take first things first, could you tell us how these injuries happened? I have no questions for Dr. Mensh.

Mr. Margolius: He hasn't been identified.

Mr. Richardson: He identified himself.

Mr. Margolius: Excuse me, I thought he hadn't.

Dr. Cliff: I understand you had an accident in November of 1960?

Pvt. Cassidy: Yes, sir.

Dr. Cliff: Could you tell us about it or have you a copy of the incidental you could read to us?

Deputy Chief Embrey: November of 1960?

Mr. Umstead: While we are waiting, Mr. Margolius, you realize that his entire personnel and medical records are before the Board?

Mr. Margolius: Yes.

Dr. Cliff: Would you care to read that to us?

[3] Mr. Margolius: "James J. Cassidy, white male, 38, 22 Wilcox Court, Virginia Hills, Alexandria, Virginia, phone #SO 8-8061, a private in the Metropolitan Police Department, assigned to the Fourth Precinct and detailed to the AH-Training Division, (Canine Corps), reports that about 3:30 pm., Wednesday, November 16, 1960, while on duty at the dog training center at the National Training School, 2201 South Dakota Avenue, N.E., and engaged in training, (running for a dog on the attack), I slipped and fell on the gravel surface causing lacerations to the face, left hand and left knee. To police and Fire Clinic, Friday, November 18, 1960 and examined by Dr. Weller, no treatment necessary. Injury to Officer report ordered by Dr. Harrell. Witness: Pvt. William B. Corcoran. This injury was incurred on duty and in the actual performance of duty." Signed Alexander S. Douglas.

Dr. Cliff: Is there another one for July of 1961?

Mr. Margolius: Yes.

Mr. Umstead: In that connection, before you proceed, it was read that he injured his back again in 1961, in July?

Deputy Chief Embrey: That one is right here.

Mr. Umstead: But before we get to that, Officer, I would like to ask you, having read a report which doesn't include anything about your back, can you tell us how you got your back injured when it wasn't hurt in the first place?

Pvt. Cassidy: That particular day when I ran for the dog, two dogs, it was a training exercise and I was running for this dog, a smaller dog, and I didn't anticipate getting hit as hard as with the other dogs and he hit me with his forelegs off the ground and first thing you know, I was on the ground on my back. Well, I broke my watch crystal and was on my back and it hurt me generally. I don't think I had ever been knocked down before by a dog in training exercises. So that night my stomach had been bothering me and I didn't feel very well so I went to the clinic the next day and Dr. Esch asked me what had happened and I told him. And he told me to see Dr. Harrell and I explained to Dr. Harrell and he asked me why I was skinned up and he told me make up an incidental out on it. And my back had been bothering me and I told him about it at that time.

Mr. Richardson: Bothering you since when?

Pvt. Cassidy: Since that day.

Mr. Richardson: Bothering you since the incident of the previous day?

Pvt. Cassidy: Yes.

Mr. Umstead: Would you explain why there is no mention of your back included in that incidental if in fact your back was bothering you as a result of this?

Pvt. Cassidy: I don't know. Dr. Esch put that in there. I told him my back was bothering me.

[4] Mr. Umstead: Who filled out the incidental?

Pvt. Cassidy: I did.

Mr. Umstead: And you never mentioned the back, is that right?

Pvt. Cassidy: Yes.

Dr. Cliff: Could you read us the report in July of 1961?

Mr. Margolius: "About 12:30 am, Saturday, July 15, 1961, while detailed to the Canine Corps from the 4th Precinct and working the 7:00 P.M. to 3:00 A.M. tour of duty at the Tenth Precinct, I responded to the scene of a yoke robbery at 3121 16th St., N.W. While negotiating a track and a free search with my police dog "Wolf" inside the Powell playground located in the 3100 block of 16th St., N.W., it became necessary for me to jump over an anchor fence. As a result of this jump, I injured my back. I remained on duty but when the stiffness to my back persisted and pain developed, I reported to the Police and Fire Clinic on Tuesday, July 17, 1961 at 10:00 A.M., where I was examined and treated by Dr. Victor Esch of the clinic staff. He diagnosed my ailment as an acute lumbral secal strain and ordered me on sick leave. I returned to duty on Monday, July 24, 1961."

Mr. Richardson: The date of that was what?

Deputy Chief Embrey: July 15th.

Mr. Umstead: Returned to duty July 24.

Dr. Cliff: Had you ever had any trouble with your back before November 1960 when you had this first injury reported here?

Pvt. Cassidy: Nothing severe, I mean nothing that would cripple me, just pain, a little pain and stiffness, but nothing that would actually —

Mr. Margolius: This part of 1960 or 1961?

Pvt. Cassidy: Referring to 1961.

Dr. Cliff: I am asking did you ever have any trouble with your back before the first injury you mentioned to us?

Pvt. Cassidy: No.

Dr. Cliff: Did you ever have any trouble with your back?

Pvt. Cassidy: Just a little stiffness now and then.

Dr. Cliff: Had you ever visited the Police and Fire Clinic for your back prior to that incident?

Pvt. Cassidy: No.

Dr. Cliff: Can you tell us —

[5] Mr. Margolius: Excuse me, before you leave that — 1958 lumbral sacral strain. May I say to the Board, his sick record shows three days off in 1958 for lumbo-sacral strain. There is an incidental in there, the end of March 1958, he went to the clinic on April 4, 1958.

Mr. Umstead: Do you remember the circumstances concerning any incident in 1958?

Pvt. Cassidy: Yes, I do. It was at the scene of a fire on K Street, S.W. Deputy Chief — I can't think of his name offhand — he complained of a citizen bothering a fireman trying to lay the hoses out. So he pointed the man out to me and my partner and we went up to the house in which the man was standing in front of and at that time they had taken somebody out of the house next door. And she was living by herself, and elderly woman, and nobody knew her name. The reason we went to this house was to find out the person's name that the fireman had taken out for a report. And this man was standing on the porch and he was drinking and was under the influence. And Officer Fitzgerald, my partner, asked his wife what the person's name was and he told his wife to mind her own business and don't tell him anything. So at that time I told him to go into the house, otherwise he would have to be locked up because he was bothering the investigation. So he turned around and as he turned around, he made a gesture towards me and we were standing near the doorway and he slipped and I slipped with him and I went out and got this Deputy Chief Stafford and I explained to him that these people said that I had struck this man. And I said I hadn't and I wished them to speak to somebody in the house since there was no Official there from the Police Department and he said he would. And so he did and he talked to somebody in there and he said that was the man that had been hindering the firemen.

So just about that time Lt. Peppler came up and I explained to him that these people said that I had struck the man and that I hadn't struck him and that it was a misunderstanding. And I tried to explain it to him and he wouldn't listen to me. So in the precinct they lodged a complaint at that time. And sometime after that my back was bothering me and Captain

Strange wanted me to pay for a rocking chair which was supposed to have been broken in this incident. And I said I wouldn't because I didn't break it and I didn't want to be in any altercation which I hadn't been in. So I didn't pay for the rocking chair and that was it.

About a week later my back had been bothering me and I didn't want to go to the clinic and so finally it bothering me so much that I went to the clinic and the doctor took me off sick.

Mr. Margolius: Time lost, 3 days.

Mr. Umstead: And between then and 1960 did you have any further difficulty with your back following this first incident in 1958?

Pvt. Cassidy: No sever pain, no severe, you might say crippling pain which happened at that time when I couldn't straighten up and I had to go up and get these heat treatments.

Mr. Richardson: Did your back continue to bother you?

Pvt. Cassidy: Occasionally. Nothing that I couldn't perform my duty, just general, local pain. That's all.

[6] By Dr. Cliff:

Q. Had you ever had any trouble with your back before 1958?

A. No, sir.

Q. Were you in the service?

A. Yes, sir.

Q. Do you get any pension from the V.A.?

A. No, sir.

Q. Did you ever apply for a pension?

A. No, sir.

Q. Have you been working off duty while you were working for the Police Department?

A. I had one part-time job.

Q. Doing what?

A. I was working for cold-temp refrigeration, working in the shop and cleaning motors.

Q. What period does this represent?

A. I believe 1962.

Q. Did you hurt your back at that work at all?

A. I worked there four or five months.

Q. Did you hurt your back there?

A. No, I wasn't doing lifting.

Q. Did you ever hurt your back off duty swimming or playing baseball?

A. No, sir.

Q. Engaging in sports or activities?

A. No. One time more recently I was getting up for work and I went to put my long johns on. I was working day work and I got one leg in and first thing hit me, I couldn't get them on. And I lay in bed and was in severe pain. I couldn't get to the clinic.

Q. When was this?

A. Recently.

Q. Did you tell us that after 1958 you had a little trouble with your back but not very much?

[7] A. Yes, sir.

Q. Up until this time you fell on the playground, was it in November 1960?

A. 1961.

Q. After this injury in 1960, how much trouble did you have with your back?

A. Very little, not too much.

Q. Didn't lose time from work?

A. No, I don't believe so.

Q. Then you had this second injury or third injury in July of 1961, is that right?

A. I believe that is the second.

Q. If you had one in 1958, 1960, 1961 would have been the third?

A. The third.

Q. You didn't have too much trouble up till July of 1961, is that correct?

A. Yes, sir.

Q. Would you tell us what has happened since July of 1961 so far as your symptoms are concerned?

A. Well, they got more severe. It was just a local thing, just in the middle of the back whereas after this particular injury, at times I have got a knob in my spine when I walk and I put my foot down and I can feel it right on my spine. And up until that time in 1958 when it hit me, I couldn't straighten out. I have never gotten that bad after that injury in the playground in 1961 where it bent me over and I couldn't bend or go forward or anything. But it seems to worsen after that.

In other words, that particular night that that injury happened I was working. I got off at 3:00 in the morning. I am off Sunday and Monday. I had difficulty getting into the car, getting out of the car, I figured, well, it's a little stiffness. I had done a little running. It got worse and got to the point where I felt I wasn't going to get any better so I went to the clinic. That is when Dr. Esch told me I had this sacroiliac strain. I was off and I figured it might get better, but it got worse. So he sent me for treatment.

Q. What symptoms do you still have?

A. I get pains in my neck which I never got earlier in 1958. He has been treating me for sacroiliac strain. I didn't have it in 1961. It was just the back. Then in the last six or seven months it has been in the neck. I went up there in January of 1961. Dr. Esch treated me for the grippe.

[8] Mr. Margolius: When is that, 1961 or 1962?

Pvt. Cassidy: This one here in 1-18-62. I went up there at that time for my neck and after, I think, two days I went back and it was down in my back and I was crippled up and I couldn't straighten out. That time, I believe, he sent me for x-rays.

Mr. Margolius: It shows on the sick card as grippe.

Dr. Cliff: Actually what I asked was what symptoms do you have now. Why can't you work? Why do you want to retire?

Pvt. Cassidy: Because I feel it hasn't got any better.

Pvt. Cassidy: Because I feel it hasn't got any better.

Dr. Cliff: What we are asking you is to forget all the previous questions. What is your chief difficulty now?

Pvt. Cassidy: Fatigue and just, for instance, for no rhythm or reason, I get tired. I have never got tired before. I get these pains in the back playing with the children. Anything seems to bother my back. I get up in the morning, I have pains in the shoulders and neck which I never had and when I do a lot of walking, it fatigues me and I have got to sit down. Generally it is a situation that I felt was just local in the back and now it has gotten worse.

Mr. Richardson: How much sick leave have you used in the last six months?

Pvt. Cassidy: Seven or eight days.

Mr. Richardson: Better than half.

Pvt. Cassidy: Prior to November when they put me off, I only had about forty.

By Dr. Cliff:

Q. You haven't worked since November?

A. Yes, sir.

Q. You have?

A. No, sir.

Q. You have not worked since November?

A. No, sir.

Q. Does this pain you have go anywhere else?

A. No. It's just in my leg if I stand a long period of time but not from my back. It don't seem to go from my back. My legs get tired, but pain doesn't seem to run down the back, just in the knees or something. That is when I say I stand a long time for a short period or something.

[9] Q. Are you taking any treatments now?

A. No, sir. Just rest and heat if it bothers me real bad or aspirin or rest or whichever would take away the pain or relieve it.

Q. How often do you take a heat treatment?

A. Well, I don't take it too often, only when it gets severe that I have to, in other words, when I feel I am stiffening up, then I would.

Mr. Richardson: These heat treatments are self administered, you just use a heating pad?

Mr. Cassidy: Yes, sir.

Mr. Richardson: Has surgical correction been suggested to you at any time? Has it been that severe?

Pvt. Cassidy: Well, Dr. Esch mentioned it one time. He said neuro-surgical consultation, but that was all. It was never developed.

Mr. Richardson: In other words, he suggested the possibility but didn't recommend any positive action?

Mr. Margolius: But you never had one?

Pvt. Cassidy: No. I believe after the test he took for rheumatism, whatever it was, he said he didn't believe I had rheumatism, I believe.

Mr. Richardson: There has been nothing here to show a dislocation of the spine has there?

Mr. Margolius: Dr. Esch in his report says he has traumatic arthritis. This is the diagnosis given by Dr. Esch.

By Dr. Cliff:

Q. They never recommended to you that you have myelogram?

A. No, sir.

Q. Did you ever take much medicine?

A. Only what they gave me.

Q. I wonder if you have taken enough to give it a good test?

A. What does a myelogram consist of. I don't know what —

Q. Well, you said you just take aspirin occasionally. I was wondering if you had taken more previously or whether you had had an opportunity to take enough medicine to alleviate the pain so you could continue working?

A. Well, the only thing I have gotten, I don't know the name of the pills. Both Dr. Harrell and Dr. Bailey and Dr. Esch have given me different things.

[10] Dr. Mensh: He has been on muscle relaxant in addition to salicylates.

Dr. Cliff: I have no more questions at the moment.

Deputy Chief Embrey: I am unable to find that report in 1958 that Officer Cassidy spoke of. I would like to ask the Officer — do you have it with you?

Mr. Umstead: What are you looking for?

Mr. Margolius: This question of the man falling down, this is the answer to that incident that took place.

Pvt. Cassidy: The thing was, I was treated for sacroiliac strain a week, ten days after this incident and it happened while I was working at that particular time.

Mr. Richardson: This paper is an answer to a complaint filed against you?

Pvt. Cassidy: Right.

Mr. Richardson: Mr. Margolius, I will hold this and if you want, you can introduce it later.

Deputy Chief Embrey: You can go to #4 and see the files.

Mr. Margolius: His testimony, as I gather, is that he did not report the injury. What he did is he went off sick some days later. This thing happened March 22. He went off sick on April 4th.

Deputy Chief Embrey: What year?

Mr. Margolius: 1958.

Mr. Umstead: L.S. Strain, a total of three days absence from the 4th day of April to the 8th day of April.

Deputy Chief Embrey: There is no injury at all.

Mr. Umstead: No, it just shows that apparently some 4 or 5 or however many days later, he went to the clinic and was off for lumbo-sacral strain. But it doesn't indicate any relationship to the accident.

Deputy Chief Embrey: In January 14, 1962, carrying a foot locker downstairs, he fell and grabbed a hand rail and hurt his hand. Did you hurt your back at that time?

Pvt. Cassidy: No, sir.

Deputy Chief Embrey: You went back to the hospital for an x-ray?

Pvt. Cassidy: Yes, sir.

Deputy Chief Embrey: You were on light duty for three weeks after that?

[11] Pvt. Cassidy: Yes, sir. I had my hand in a cast.

Mr. Margolius: He broke his hand.

Deputy Chief Embrey: Why did you come off the Canine Corps?

Pvt. Cassidy: Well, I had a great deal of difficulty with the particular dog I had and that was the main reason.

Deputy Chief Embrey: Are there others?

Pvt. Cassidy: Well, the work was strenuous.

Mr. Margolius: Tell him the reason you gave, the problem with your wife and children and dog.

Pvt. Cassidy: The dog I had was always attacking other dogs and I just got to the point where I felt I had a good dog. I know I had a good dog. I proved it. The dog proved it. Nevertheless, there was one thing that wasn't proven to me, that the dog got over the fact that he wouldn't tolerate other dogs. Every time he seen another dog, he jumped it. It got to the point where I would just think he was getting over this thing and he would attack another dog. And I felt after having him a year and a half and working with the dog and loving him and seeing him do the things you want him to do but nevertheless not having full control over him and also the fact that I had to keep him around my family, he showed indications that he could possibly attack one of them which to me was enough. At one instance he did grab my wife and another incident he grabbed one of my children. He didn't maim them in any way, but to me it was an indication that he could and I have seen him get vicious and I felt as though, when he attacked me, well, that was something that happened too, that was the whole reason why I got rid of him.

Mr. Margolius: He bit you, didn't he?

Pvt. Cassidy: Yes, sir. I had him out in the yard with my other dog and they didn't get along and I felt, well, my wife wanted to keep a dog at home while I was working and I felt the one reason it was good to have the dog because we might get this out of him to tolerate another dog and I had both dogs in the yard. And first thing he grabbed hold of my other dog which is a small beagle and this is the second occasion he got him and he wouldn't let him go and I kicked him and he still wouldn't let him go. So I took a bedstead that I had in the yard and I had to beat him off.

Meantime my child, my second youngest, was on the stoop and he was trying to break it up when it first happened and I was afraid he might attack the boy so at that time I said, "This is the end. I don't feel as though I can take this anymore." And my wife got upset and she said, "as far as I was concerned, I didn't want any part of it."

Mr. Richardson: How long ago was this?

Pvt. Cassidy: This was 1961. I might add too that as far as another dog was concerned, I didn't feel like I wanted to take another dog because I had my fill of it. The dog was, to me he was a wonderful dog but nevertheless he was a killer as far as I was concerned. He had killed another dog after I got him. I was willing to put with that because after all he was only an animal. [12] It might be able to be taken out of him, but unfortunately it wasn't. I had seen him time and time again and I thought they could take it out of him. The dog was given to another Officer and I believe, I don't know, Chief, he went through training and after ten week's of training with me, I believe I went maybe 15 weeks with the other man and he went on the street and attacked another dog while on a pocket book case. He left the pocket book chase to attack another dog. I understand they gave him to the Air Corps as incorrigible.

By Deputy Chief Embrey:

Q. The dog was Wolf?

A. Yes. I had a dog prior to Wolf. Shep. Shep, well — do you want me to give the reason why I left the Canine Corp?

Q. That's what I want.

A. The first dog I had was a master baker. Now you don't want a dog around like that.

Q. What happened to Shep?

A. They said he was too mild and they didn't want to put in the time with him.

Q. And they gave you another dog, is that right?

A. Yes.

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A. They said he was too mild and they didn't want to put in the time with him.

Q. And they gave you another dog, is that right?

A. Yes.

Q. That was Wolf?

A. Yes.

Q. When you went in the dog corp, did they give you a physical?

A. Yes, sir.

Q. Did they find anything wrong with you at that time? That was in Pg 41 60, wasn't it?

A. Yes, sir.

Q. Now, when you went on the street, did they give you another physical?

A. I took it when I was made a Technician.

Mr. Umstead: When was that?

Pvt. Cassidy: When I completed my training. I don't know whether or not I got a complete physical when I first applied, I am not sure.

Mr. Richardson: This one you got was when you completed your training?

Pvt. Cassidy: Yes, sir. And I was advanced to Technician.

[13] Mr. Richardson: Any physicals since then?

Pvt. Cassidy: Well, my fortieth year.

Mr. Richardson: Fortieth birthday, you had a physical?

Pvt. Cassidy: Yes, sir.

Mr. Richardson: And were there any significant findings then?

Pvt. Cassidy: No.

Mr. Richardson: When was that?

Pvt. Cassidy: I think I was 39 going into the 40th birthday whichever is nearest, I don't know the exact day.

Mr. Richardson: That would have been March 1962?

Pvt. Cassidy: Fairly recently.

Mr. Richardson: You were born in 1922?

Pvt. Cassidy: I think I took it when I was 39. I am sure I wasn't 40 then. If you got six months in between, they send you for a physical.

Mr. Margolius: In the spring of 1962, as a matter of fact, from July of 1961 when you had this injury and the dog knocked you down, July 1961?

Pvt. Cassidy: Yes.

Mr. Margolius: I think there is an incidental. Until July 1962, you worked fairly regularly, didn't you?

Pvt. Cassidy: Yes.

By Deputy Chief Embrey:

Q. On August 11th did you make application to transfer to #10?

A. Yes, sir.

Q. What happened to it?

A. It was disapproved.

Q. Why?

A. It is in the jacket.

Q. Want me to read the answer? A letter of August 11, 1961.

"Private Cassidy was detailed to the Canine Division on April 25, 1960. He was assigned as Technician Class II (Dog Handler) on August 7, 1960. He is being relieved of his assignment as Technician Class II (Dog Handler) effective August 20, 1960, at his own request.

[14] On August 11, 1961, Private Cassidy submitted this application for transfer to the 10th Precinct. This application is dated in advance of his re-assignment to the Fourt Precinct.

It is evident from the foregoing facts that Private Cassidy is confused, disturbed and undecided as to just what he wants in this department. Therefore, rather than to continue this trend, it is recommended that he be retained in the Fourth Precinct for a considerable length of time to allow both he and the department to decide what assignment is best suited to him.

It is recommended this application for transfer be disapproved."

Now in that year and three months that has elapsed since then, how much of that time has been spent on sick leave?

A. That first date was what, sir?

Q. Since August 11, 1961, how much sick leave have you had?

A. 40 days up until March.

Q. Up until November of last year?

A. November of 1962.

Q. And you haven't worked since November?

A. Yes, sir.

Q. So in the year following, or the year and a month following your disapproval of transfer, you spent 40 days on sick leave?

A. That is right.

Mr. Margolius: Before you leave this Chief — why did you want to transfer to #10?

Pvt. Cassidy: That was never discussed with me.

Deputy Chief Embrey: Did you fill out an application for transfer?

Pvt. Cassidy: Yes, sir.

Deputy Chief Embrey: What did you put on it for your reasons?

Pvt. Cassidy: I said I had spent most of the time in the Canine Corp in the 10th Precinct. I don't recall the exact words. I think I said I felt as though I was more —

Deputy Chief Embrey: "I respectfully request this transfer to the Tenth Precinct after having spent most of the time in the Canine Corp there. It is more active and I've become adjusted there. Feeling I would serve the Department better in that Precinct."

The Captain's answer was to see attached reports which I have discussed already. The Inspector's report to the Executive Officer was that he concurs with the reason for detaining Private Cassidy. It is signed William T. Murphy.

[15] Was that the reason you wanted to stay in #10, you had been there during your Canine Corp tour of duty?

Pvt. Cassidy: Yes.

Deputy Chief Embrey: You liked #10?

Pvt. Cassidy: Yes, I liked it and I felt I had done some work up there. Captain Richardson didn't ask me why I wanted to go to #10 or anything. He just drew a conclusion.

Mr. Richardson: Were you at odds with any Commanding Officer's in #4?

Pvt. Cassidy: No, not up till that time.

Mr. Richardson: Or fellow officers?

Pvt. Cassidy: No.

Deputy Chief Embrey: How did you get along with Sgt's and Lt's down there?

Pvt. Cassidy: Pretty good to my knowledge.

Mr. Margolius: Officer Cassidy, up to August 1961 when you put your request in for transfer, for the previous year and a half had you been in #4?

Pvt. Cassidy: No.

Mr. Margolius: So that there was no connection between you and #4 except you were assigned to that Precinct, but you were not reporting to #4, were you?

Pvt. Cassidy: No.

Mr. Richardson: This was immediately following your release from the Canine Corp?

By Deputy Chief Embrey:

Q. How long were you on the Canine Corp?

A. I don't know, about a year and a half I believe.

Q. So you didn't go to #4 at all while you were in the Canine Corp?

A. Yes, sir. I went occasionally.

Q. On duty I mean.

A. No, I wasn't detailed there.

Q. You were working under the supervisor of the Tenth Precinct? I am talking about you did duty.

[16] A. I did no duty, sir.

Q. Now, on this report submitted on the 24th of July 1961 when you jumped over the fence, did you make an arrest in that case?

A. Yes, sir.

Q. For what?

A. Well, I didn't make the arrest, no, sir, but there was an arrest made.

Q. At the same time or was it later?

A. Within an hour.

Q. Who made it?

A. Detective from #10.

Q. But you or your dog didn't get this man?

A. No.

Q. The report was made ten days after the injury. How come on that?

A. Well, I was, as I said, I was working, I got off two o'clock or whatever it was. And it was my day off, Sunday and Monday or — what date is this?

Q. July 1961.

A. Dr. Esch was the one that told me to make the incidental report as to what happened.

Q. When did you first go to the clinic on this injury?

A. I went to the clinic on the 18th.

Q. Three days after?

A. Yes, sir.

Q. In other words, you stayed on two days?

A. My days off were Sunday and Monday and I went to the clinic Tuesday.

Q. Why didn't you go to the clinic Sunday?

A. As I said, I felt as though this may go away and I got the stiffness and I had two days off and I felt, well, maybe it's one of those things that will go away, but when it didn't go away, I went to the clinic.

Q. Dr. Esch says, "Return to duty July 26, 1961. No disability." Did he tell you that?

[17] A. Not at that time, no, sir.

Q. Did he later tell you that?

A. I don't recall.

Q. Did you ever do duty in any other precinct except #4, except the time you were detailed in the Canine Corp?

A. Yes, sir. I was detailed in #9 during the school trouble over there and a few years back.

Q. That was just a few days, wasn't it?

A. Yes, sir.

Q. I am talking about being assigned.

A. I was never assigned to any other precinct.

Deputy Chief Embrey: I have no further questions.

By Mr. Umstead:

Q. Officer, I would like to know what specifically you did while working off duty time. What was your specific work?

A. Well, cleaning motors, incidentals motors and general shop work or cold-temp refrigerations in the Bond Building.

Q. How many hours a day would you work?

A. Well, that would vary as to —

Q. Approximately, on an average?

A. Oh, I would say no more than probably three to four as an average. I mean my day off I would work more than that. Sometimes it would all depend what shift I was working.

Q. When did you last work there?

A. July of 1962, June probably.

Q. Did you lose any time from this extra work by reason of your back?

A. When I was sick, I didn't work there if that is what you are referring to.

Q. My question was: did you lose any time from this extra employment by reason of this back condition?

A. Yes, sir.

[18] Q. How much?

A. I don't know off hand.

Mr. Margolius: I understand your question. Are you saying did he lose any time from his outside employment because he hurt his back or his outside employment?

Mr. Umstead: No, I am just asking how much time he lost from outside employment by reason of the condition of his back.

Pvt. Cassidy: Well, when I was off sick here, that was in August.

Mr. Umstead: What year are you talking about now?

Pvt. Cassidy: 1962. I went to work, I am trying to find out when I

went to work because I didn't work all the time. It was in the winter time.

Mr. Margolius: It was approved in March.

By Mr. Umstead:

Q. It was approved in March of 1962 to go to work for these people?

A. I wouldn't have lost any time that I know of, maybe eight days that I know of.

Q. By reason of your back?

A. Yes, sir.

Q. Did there ever come a time that you had to leave your work by reason of your back while doing this outside work?

A. Well, July the man let me go because I couldn't do any lifting, and he felt as though he was training me for refrigeration work and he said he had no inside work and would have to let me go.

Q. Now, between March and July, he keep you between those time, right?

A. Yes, sir.

Q. Now, what specifically were you lifting in the month March, April, May, and June which you couldn't lift in July which prompted him to let you go?

A. I didn't get that.

Q. What specifically were you lifting in the months of March, April, May, and June which prompted him to let you go in July when you couldn't lift things as was required?

A. Well, he had a lot of heavy equipment. For instance, he had these two, three-ton units which I felt as though I couldn't lift and he wanted me to go out on jobs and he felt as though I couldn't do it so he let me go. In other words, [19] in the winter time he had the small motors I was working on. When he got big jobs, he wanted me to go on them. I felt I couldn't do it. I didn't mind working around the shop. I cleaned up the units but I couldn't go out and work on some job.

Q. What was the maximum weights that you would lift in the job you had while you were on duty?

A. I suppose maybe 40 pounds.

Mr. Richardson: Mostly electrical motors, were they?

Pvt. Cassidy: Yes. They brought them in and I would clean them on the floor. They would bring them in and leave them on the floor and I would clean them on the floor. All the others they would have on a bench, but most of the big units, 3 ton, 5 ton units they would bring it in and park it there and I would clean it.

By Mr. Umstead:

Q. After you finished, you would move it?

A. No, sir. They took them out.

Q. You didn't move it at all?

A. I moved it, yes, sir.

Q. How frequently would you have to move these 40 pound motors, if you did?

A. We didn't have too many of them.

Q. How many would you say?

A. Maybe ten, 15.

Q. In what course of time?

A. During the course of time I worked there.

Q. And you had no difficulty at all over these 40 pound motors, is that right?

A. I had some difficulty, yes.

Q. And did you advise your employer immediately that you had had difficulty in March, April, May, and June with lifting these 40 pound motors?

A. No, I didn't tell him at that time.

Q. What activity do you engage in for recreation at the present time?

A. I don't have much of anything.

Q. What activity did you engage in before November of 1962?

[20] A. Well, I suppose swimming when I went on my vacation this summer, a little badminton. That is about all.

Q. This was in 1962 you had occasion to perform these activities?

A. Yes, sir.

Q. Tell me what specifically can't you do now that you could do previously so far as Police duty is concerned?

A. What I can't do now?

Q. What specifically can't you do now that you could do previously?

A. Well, I feel that I can do most everything I done before except with great discomfort and some degree of pain which keeps me from doing my duty. For instance, running, that effects me at times, for instance, getting off at midnight, coming back at eight o'clock in the morning, getting up at seven o'clock. I don't feel I get enough sleep, tired all the time. Sometimes the children keep me awake. I don't seem to have the energy and ability that I had before.

Q. Is your lack of energy and being tired your principal problems?

A. Well, not the principal one but it's one of the problems. I suppose you might say it is the principal problem.

Q. Do you wear a back brace of any kind?

A. No, sir.

Q. Have you ever worn a back brace?

A. No, sir.

Q. Describe for me, if you will, what sensation, if any, you had when you jumped over the fence in July of 1961.

A. Well, I got a stiffness right after I had jumped over the fence and it got grew progressively worse that night.

Q. How soon did you notice the stiffness once you jumped over the fence?

A. While I was still in the playground, five minutes approximately.

Q. Within five minutes your back was stiff?

A. Yes.

Mr. Richardson: Did you feel immediate pain when you jumped over the fence?

Pvt. Cassidy: I can't say.

[21] Mr. Richardson: Did you fall to the ground when you went over?

Pvt. Cassidy: Yes, sir.

Mr. Richardson: Had your dog been freed when you went over?

Pvt. Cassidy: Yes, sir.

Deputy Chief Embrey: How high was the fence?

Pvt. Cassidy: About three feet on that side of the school. The actual fence around the school is ten foot high, but this fence is on the side of the playground by the entrance to one of the side doors of the school. When he jumped the fence I was afraid that he might get out onto Hiatt Place and get somebody.

Mr. Richardson: Did you actually leap the fence?

Pvt. Cassidy: No, I jumped over it. The fence is just this high and it only blocks in part of the courtyard of the school.

Mr. Richardson: So you leaped the fence without the use of your hand, just leaped clear?

Pvt. Cassidy: Yes.

Deputy Chief Embrey: Officer Cassidy, you were appointed in 1951?

Pvt. Cassidy: Yes, sir.

Deputy Chief Embrey: In the year 1952 you took ten days sick leave, nine at one time and one at another. In the year 1953 nine days. Six days in 1954. In 1955 you had eight days. In 1956 you had five. In 1957 you had twelve days. In 1958 you had twelve. In 1959 you had two. Now we get into 1960. You had thirteen. In 1961 you had ten. In 1962 you had forty, plus the time you went off in November. Did you have any trouble with Captain Richardson? Did you and he get into an argument over the disapproval of your transfer?

Pvt. Cassidy: No, sir.

Deputy Chief Embrey: Your reason for going sick outside of one for arthritis —

Mr. Margolius: These are entrys made by the doctor's, not reasons. You will also find, Chief, that he had a scraped up face and hands and knees and ultimately hurt his back and you will look on the sick card and see he was off for Gastro-Enteritis.

Deputy Chief Embrey: He had a very good sick record up to 1962 when he had a transfer disapproved and immediately his sick leave started — 40 days.

Mr. Margolius: Until this arthritis developed.

Mr. Richardson: Mr. Margolius, is there anything you would like to develop further?

Mr. Margolius: Yes.

[22] By Mr. Margolius:

Q. Mr. Cassidy, how long were you stationed in #4 Precinct, how long were you assigned to #4 Precinct?

A. Approximately twelve years.

Q. And that included the period of time you were on the Canine Corps?

A. Yes, sir.

Q. So actually you were doing work in #4 Precinct for about ten years more or less?

A. Yes, sir.

Q. During that period of time did you have occasion to frequently arrest people, maintain arrest?

A. Yes, sir.

Q. Did you have occasion during that period of time to fight and wrestle with prisoners?

A. Many occasions.

Q. Were there times from time to time when you were thrown to the ground and fought and wrestled on the ground?

A. Many times.

Q. During that period of time did you feel any discomfort or personal inconvenience, but did not take time off?

A. Well, I was young then. I felt I could take a little knocking around now and then, yes.

Q. The point I make is that you did have the bumps and bruises where you didn't go to the clinic.

A. Yes, sir. I have had many such occasions.

Q. And you gave me today a photograph of you holding a prisoner down on the street that was in the News?

A. Yes, sir.

Q. Did you wrestle with this man, when was this?

A. That was in 1953.

Q. Did you wrestle with this man on the hard pavement?

A. Yes, sir.

[23] Q. Did you sustain bruises in this?

A. I got a cracked rib out of it. I don't know if anything is in there.

Q. Did you take any time off from work after this?

A. No, sir. I would like to mention something about that photograph. It may look like I got the best out of that deal, but that guy was on top of me before the photographer got there and he had kneed me in the chest and I was treated at Providence — I went to Emergency Hospital, but at that time I was sore and I didn't have any — maybe I was treated for lacerations of the face. I don't recall, but later on, a period of a week, I don't know if there is anything to show from an x-ray I had taken for a cracked rib and I testified to that in Court, that I had been injured at that particular time. But it didn't hurt me as much that time as later because every-time I took a breath, I would get a pain in my back and in my chest.

Q. When did this take place?

Deputy Chief Embrey: You went to Court in June 1953.

Pvt. Cassidy: June 1953.

By Mr. Margolius:

Q. Nothing in here except colds and Colitis.

A. There should be.

Q. Well, the point I am making, Officer, is that you have had tussles and fights as all Policemen have had and have not gone to the clinic.

A. Yes, sir.

Q. Dr. Esch has been treating you since November 1960 on, is that right?

A. Yes, sir.

Q. Now, in 1960 when you saw Dr. Esch, in November, did you tell him that you had some trouble with your back in that accident where you went on the cinder path?

A. At that time —

Q. Let me say this. Dr. Esch in his report states as follows, "Private James J. Cassidy has been under my professional care since November, 1960. His chief complaints have been pain in his lower back and left knee, and generalized fatigue. He dates the onset of his symptoms to an injury which he incurred in the line of duty on November 16, 1960."

Now, he says he has been treating you since November 1960. Did you in 1960 tell him what was the matter?

[24] A. I told him I was having trouble with my back but I don't recall having trouble with the knee at that time except having a bruise.

Q. But the point is, at the time of that accident you came under the care of Dr. Esch?

A. Yes, sir.

Q. He is the one that wrote this report, is that right?

A. Yes.

Mr. Margolius: Now, there is an incidental, Chief, that I read in the record in November 1960 which talks about face, knees and hands, as I remember, and arm. And I would like to divert a minute and say that in November 1960, and there is also a statement there by Dr. Harrell as to his conditions and I would like to state for the record that the only entry here in 1960 is Gastro-enteritis and yet there is a signed statement by Dr. Harrell in the files stating other things. I want that stated.

Mr. Richardson: Well, the file will be considered in its entirety by the Board.

By Mr. Margolius:

Q. Now, this pain that you have got in your low back which is apparently is what is giving the clinic some concern, has it developed or increased in severity?

A. It has, yes, sir.

Q. Was the pain prior to a given time last year or the year before an isolated or intermitted pain that would come and go and come and go?

A. Yes, sir, that is right.

Q. Since late July of 1962 has it come and gone or has it been steady? Let's take in arbitrary date, July of 1962. Has it come and gone or been steady?

A. It's just current. It stays with me. Before when I went for treatment, it would go away and it would be more or less the end of it. Since then, since this last bad attack I had, I took a trip up to Jersey and it hit me up in Jersey and I had to come back to the clinic and that is when Dr. Esch sent me to see Dr. Harrell again.

Q. Now, let me ask you this, did you injure yourself when you were in New Jersey?

A. No, sir.

Q. When working on this outside job, did you ever hurt yourself?

A. No, sir.

Q. The only time that you know that you have injured yourself outside of the bumps and bruises in arrest cases and locking up drunks and so forth, are the [25] incidents that you have related? The one going into the door down at the fire — the one in November of 1960 and the one in July of 1961, is that right?

A. That is right. Well, I was attacked here —

Q. I mean pertaining to the back?

A. I told about the incident at D Street at the Market, I arrested this man for drunk and disorderly.

Mr. Umstead: When was this?

Pvt. Cassidy: This was in — well, I was assigned to Scout #41 this particular night and we were in the 300 block of E Street, S.W., and I was pulling a patrol box, calling in, and a car come up the street with a man and woman in and the windows were open and I heard them arguing. He was using loud and profane language and he jumped out and he said to his wife, "you S.O.B., drive the car yourself." And I told him to watch his language. And

he said, "If you have got a gun, you had better use it." And he came across the street without any provocation, grabbed me, pulled my tie off and threw me to the ground.

My partner was a rookie. He was 300 feet down listening to the radio. There was another Officer checking doors for the Market to E Street and I hollered to them and at that time we started wrestling and he threw me to the ground again. So when I got up, I grabbed him and got him in an arm lock and his wife started hollering, "Don't hit him, please don't hit him." And at that time I told the Officers to give me a hand, to help me. And his wife, she became belligerent and by that time the Sgt. had got there and she hit the Sgt. in the face and we brought them in the precinct and charged them both with Drunk and Disorderly. And at that time my back gave me a little trouble but nothing that I figured I had to go off sick. But those are things that I feel as though you have to put up with on the job too.

Mr. Richardson: This is November of 1962?

Pvt. Cassidy: No. This was the summer of 1962. I am trying to get the exact date on it. And the aftermath of that, the woman struck a Police-woman in the face and she was charged with assault on a Police Officer. I didn't get out of it too bad. I got my shirt ripped and my tie, maybe a little stiffness, but I feel that is part of the job. They certainly don't help my situation.

By Mr. Margolius:

Q. Let me proceed now.

A. It is a matter of record in #4 Precinct. I didn't make any incidentals on it.

Q. You continued to work?

A. Yes, sir.

Q. You say that one of your complaints is fatigue. You have had numerous conversations with Dr. Esch?

A. Yes, sir.

[26] Q. He is your doctor at the clinic?

A. Yes, sir.

Q. The only thing he mentioned for retirement is traumatic arthritis of the lumbo-sacral region. He does not mention your fatigue. Has he concerned himself with your fatigue or has he concentrated on this pain in your low back?

A. I believe he concentrated on the injury.

Q. Now, they gave you certain tests, didn't they?

A. Yes, sir.

Q. Who performed the tests?

A. The Hunter Laboratory.

Q. That was to determine whether you had any rheumatoid disease?

A. Yes, sir.

Q. I think it has already been read that was found to be negative, is that right?

A. Yes, sir.

Q. Dr. Esch told you he thinks you have arthritis which developed from these injuries?

A. Yes, sir.

Q. Do you particularly wish to retire?

A. Well, I feel if I can do the work and the job is put to me, I have made a good living, I have supported my family, but I feel I am aggravating my condition on the job and I don't feel as though I can do my job as I performed it years before these incidents.

Q. Well, do you feel in the conditions that you are now in, that you could walk a beat for eight hours?

A. No, sir. I don't feel as though I could.

Q. Do you feel that you could wrestle with a prisoner?

A. No, sir. I feel that if I could walk a beat for eight hours, if I couldn't walk it in a fashion in which I should be able to walk it —

Q. Let me ask you about the dog business. How strenuous is being a member of the Canine Corps? What do you do that is physical exertion? How much does a dog weigh?

A. My particular dog weighed 85 pounds or 90 pounds.

[27] Q. Do you have to restrain these dogs?

A. Well, my dog, as I said, was a constant fighter and in any case I was restraining it continually.

Q. When you restrained him, what did you do, hold him by the leash while he was straining to get away from you?

A. Once a dog is trained, you don't have to. You tell him to stay, he will stay. But if another dog came by he would try to attack him. For instance, you couldn't take him off the leash while others dogs were around. You had to keep him on the leash, so most phases of my training, my dog was on the leash. He shouldn't have been, I am not saying he was never off the leash. He certainly was. Other men would walk their dogs past my dog to give them practice in restraining. Wolf would get upset and froth at the mouth and I would have to restrain him. Most men didn't have to put up with that.

Q. Have you ever been knocked over by your dog and not reported an injury?

A. Yes, I have.

Q. Is that unusual, being knocked over by a Police Dog, your own dog?

A. I don't know.

Q. What I am saying, does it happen once every five months, every six months, or more frequently then that?

A. Well, during the training I would say I was knocked down quite a few times when I shouldn't have been, where he got in fights with other dogs and I had to pull him down and things like that.

Q. It is not unusual to break up fights between two dogs?

A. No. If you ever tried to break up a fight between 90 pound dogs, it's quite a problem. I have seen as many as four people try to break it up. A man tries to break up his own fight.

Q. Handling a dog as a member of the Canine Corp is a more strenuous job then walking a beat or riding in a Scout car?

A. Definitely.

Q. And there are pressures put upon you physically, is that right?

A. I would say so, constantly sometimes, tracking, running, jumping.

Q. What is tracking?

A. Tracking, you might go on a five mile track with a dog, maybe an hour track. You have the dog on a leash, tracking maybe 30, 40 feet. When you first start with your dog, of course he doesn't know about tracking.

Mr. Richardson: This is part of your training?

[28] Pvt. Cassidy: Part of your training. If you are on a mile track, he might be pulling you for the whole mile and they say, "Don't let him run." But you try to hold him back.

Mr. Richardson: Where did you train your dog?

Pvt. Cassidy: Archbold Estate, Rock Creek Park.

Deputy Chief Embrey: Over how long a track did you say?

Pvt. Cassidy: Not there, no, sir.

Deputy Chief Embrey: Where did you perform a five mile track?

Pvt. Cassidy: Maybe that was exaggerating.

Deputy Chief Embrey: Where a mile track?

Pvt. Cassidy: Out on route one.

Deputy Chief Embrey: Who layed the track?

Pvt. Cassidy: Mr. Cahill.

Deputy Chief Embrey: He layed the mile track?

Pvt. Cassidy: Yes, sir. We have layed mile tracks in Dalecarlia Reservoir.

Deputy Chief Embrey: I am sorry I interrupted, Mr. Margolius.

Mr. Richardson: Anything further, Mr. Margolius?

Mr. Margolius: That is all I have.

By Deputy Chief Embrey:

Q. How long were you in dog training?

A. Approximately ten weeks I believe.

Q. How many sights occurred during that ten weeks?

A. Ten or more.

Q. How many were you involved in?

Q. Ten or more.

Q. In other words, every fight at the Kennels you were in?

A. Not every fight, no, sir.

Q. You said ten or more and you were involved in ten or more.

[29] A. What do you mean?

Q. There were six men in training class, weren't there?

A. Yes, sir.

Q. Who trained you? Corcoran?

A. No, Cahill.

Q. During the time that Mr. Cahill was training you six men, how many times did the dogs become involved in dog fights?

A. Well, there was once with Newman's dog.

Q. Just how many?

A. I am trying to figure them out. I had three fights with Presage's dog, one with Newman's dog, one with Thore which belonged to Waxer, one with Hopkins.

Mr. Margolius: Did you have other fights besides that?

Pvt. Cassidy: When I went back for re-training.

Deputy Chief Embrey: Was your dog the only one fighting?

Pvt. Cassidy: In most cases, yes, sir.

Mr. Margolius: Psychoneurotic dog.

Deputy Chief Embrey: That is all, thank you.

Mr. Margolius: One of the big problems of the dog, he would eat his own stool.

By Mr. Richardson:

Q. Mr. Cassidy, are you married?

A. Yes, sir.

Q. May we have your wife's name?

A. Virginia Clair Cassidy.

Q. Is this the first and only marriage for both you and Mrs. Cassidy?

A. Yes, sir.

Q. Are there any children of this marriage?

A. Three.

[30] Q. Are they minors?

A. Yes, sir.

Q. What are the names and dates of their birth?

A. I don't know the date. Excuse me. The oldest is Cathy, she is 7-1/2 and I can't remember the date.

Q. May we have the dates?

A. Cathey Jane and Margaret Ann.

Q. Mr. Cassidy, have you been advised of your privilege of reducing your pension in order to provide a larger pension for your wife should she outlive you?

A. No, sir.

Mr. Margolius: I will advise him not to take that.

Mr. Richardson: Will you accept that advice from your attorney?

Pvt. Cassidy: Yes, sir.

Mr. Richardson: Is there anything further the Board would like to develop?

Dr. Cliff: I would like to ask two questions and a few from Dr. Mensh.

By Dr. Cliff:

Q. Mr. Cassidy, I believe you said your chief trouble was your tired fatigued feeling and the pain in your back?

A. Neck.

Q. Neck?

A. Stiffness.

Q. Which of these do you consider more important?

A. The pain in the back.

Q. That troubles you more than the fatigue?

A. Yes, sir, it cripples me.

Q. Is the pain in your back and neck enough to keep you from working, keep you from doing your job properly?

A. Does it keep me from doing the job permanently?

Q. Is it enough to keep you from doing your work properly?

[31] A. Yes, sir.

Q. Is this fatigue enough by itself, if you didn't have the pain in your back, is the fatigue enough to keep you from doing your work?

A. At times, not all the time. There is various degrees as to how tired I get. No, not all the time.

Q. Of the two then, you consider the pain in the back and neck worse than the fatigue?

Mr. Richardson: To what extent do you attribute the fatigue to the pain in your back and neck? Do you feel if you didn't have trouble with the pain in your back, you would not have appreciable fatigue?

Pvt. Cassidy: I would think so.

Dr. Cliff: I would like to read a few entries from the sick card. In April of 1958 he lost three days for lumbo-sacral strain. In I guess it's March of 1961, February or March, he lost 4 days for the same thing. In June of 1962 he had rheumatoid disease and lost 8 days. In August of 1962 he lost 10 days for rheumatoid arthritis.

Dr. Mensh, we have touched on this before but we felt he hadn't taken much in the way of medication. Do you recall from your contact at the clinic what type of medication he had over what length of time and whether or not it was successful or helpful to him?

Dr. Mensh: It wasn't specific. It was symptomatic. He was given muscle relaxants. I don't remember which pain pill.

Dr. Cliff: Over what length of time?

Dr. Mensh: I can't answer specifically.

Dr. Cliff: Would you know how successful it was?

Dr. Mensh: Apparently it wasn't successful because he wasn't able to get him back to work.

Dr. Cliff: Inasmuch as the first entries were for lumbo-sacral strain and inasmuch as the x-ray in November of 1962 showed so little changes in the spine, November 16, 1961, would you know why they favored the arthritis diagnosis over the original lumbo-sacral strain?

Dr. Mensh: That diagnosis made on the record of rheumatoid disease

really is an error. It might well have been rheumatic, not rheumatoid, because subsequent studies did not demonstrate the presence of rheumatoid disease. So that is probably in error actually. Being specific, the absence of demonstrable x-ray change does not militate against lumbo-sacral strain nor is there necessarily any correlation between the amount of x-ray evidence and the amount of pain one need have.

Dr. Cliff: Well, he had originally had the lumbo-sacral strain. I was wondering why they changed the diagnosis?

[32] Dr. Mensh: I can't answer that.

Dr. Cliff: One further question, with your contact in the clinic and the information that has been developed today, do you feel there would be any point in neurological consultation or psychiatric consultation?

Dr. Mensh: You are asking now for a personal opinion or are you asking me now as a member of the Board?

Dr. Cliff: Well, as the Board's representative.

Dr. Mensh: The Board has already designated its desire by sending the man down here. So that answers the question if you are asking from the standpoint of the Board. If you are asking me my personal opinion, that is something different.

Dr. Cliff: Well, it might be personal to the extent that many questions have been developed today which might or might not have been discussed by the Board. Would you care to give your personal opinion in that respect?

Mr. Richardson: Do you care to have it in the record, Dr. Mensh?

(Discussion off the record.)

Dr. Mensh: There would be no question in my mind, I think he deserves an orthopedic work-up, neurological and psychiatric work-up. I think this is for his own protection, I think it is for the protection of all concerned. I honestly think so.

Mr. Umstead: Before we waste any more time, I so move that this case be referred back for additional information along the lines suggested by Dr. Cliff's question.

(Discussion off the record.)

Mr. Umstead: We will ask for Dr. Harrell's report relating to rheumatoid disease.

Mr. Richardson: It would appear then in the interest of getting a proper decision from this Board that this man should go before the Board of Police and Fire Surgeons for further consideration.

Pvt. Cassidy: There is one thing I would like to ask Dr. Bailey came around the house and treated me once, one of my severest attacks. I couldn't straighten up or get out of bed. Dr. Bailey never put anything in there.

Dr. Mensh: What was the diagnosis for the illness for which Bailey went to see him?

Mr. Margolius: That is grippe.

Mr. Umstead: Did you have grippe at that time?

Pvt. Cassidy: That was the time I got up in the morning, I got one leg in the [33] long drawers and went to put the other in and it hit me in the back and I doubled up.

Dr. Mensh: Let me explain the despairity in this situation. We have in the past had two men responsible for men living at home. For example, Bailey probably got a call at home that this man called in and was sick. Dr. Bailey called his home and found this man was in bed and couldn't move. He went to see him at home. He prescribed for him and told him to stay at home and spoke to him once or twice in the interim and said, "When you go into the clinic, see your regular physician." Because Dr. Bailey doesn't have a regular position at the clinic. As a result he goes back and sees a doctor who didn't see him for the original illness and in the scuffle — the man had a backache, so it could be grippe. In this instance it could be important if he had written down and acute lumbar back pain, line of duty. So many things can eventually be important because there is a lack of continuity and we are always trying to change this, but it's extremely difficult. I am not trying to tell you my own problems, but I will guarantee that yesterday I had 35 phone calls. Everyone should be written up and put in as a matter of record. Its impossible to do.

Mr. Margolius: As a matter of fact, unless you take time off, there is nothing entered on your sick card if you go to the clinic.

Dr. Mensh: It is now, and you don't know what a job this is too.

Mr. Richardson: This man is being referred back to the Board of Police and Fire Surgeons for orthopedic, neurological, and psychiatric examinations. When the reports on these examinations are ready, we shall consider this case again.

(Witnesses excused.)

[Plaintiff's Exhibit PX 7B]

P.D. 18.4696

[1]

BEFORE THE POLICE & FIREMEN'S
RETIREMENT & RELIEF BOARD

February 28, 1963.

IN RE: Disability Retirement of Private James J. Cassidy, Fourth Precinct, Metropolitan Police Department. (Continued from 1-24-63.)

THE BOARD:

Clyde C. Richardson, Deputy Chief, Administration & Safety Division, Acting Chairman.

Lyman J. Umstead, Assistant Corporation Counsel, D. C.

Dr. Arthur E. Cliff, Chief, Health and Examining Service, D.C.

John R. Barry, Chief Instructor, D. C. Fire Department.

Albert L. Embrey, Deputy Chief, Metropolitan Police Department.

PRESENT:

Dr. Maurice Mensh, Member, Board of Police and Fire Surgeons.

Mr. Bernard Margolius, Attorney, 1000 Vermont Avenue, N. W.

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Mr. Richardson: Gentlemen, we have before us again Private Cassidy of the Police Department for retirement by reason of Physical Disability. He was heard by this Board on January 24th, and at that time upon the mo-

tion of Mr. Umstead, seconded by Deputy Embrey, the case was referred back to the Board of Police & Fire Surgeons for the purpose of evaluation.

PRIVATE JAMES J. CASSIDY

Testified under oath as follows:

Mr. Richardson: Mr. Cassidy, for the record again, will you identify yourself by full name and address?

Pvt. Cassidy: Private James J. Cassidy, 22 Wilcox Court, Virginia Hills, Alexandria, Virginia. Assigned to #4 Precinct.

Mr. Richardson: Mr. Margolius, for the record will you identify yourself?

Mr. Margolius: Bernard Margolius, 1000 Vermont Avenue, N.W., Washington, D.C. Attorney for Mr. Cassidy.

Mr. Richardson: Not knowing just how well we would remember the various facts of this, when we came back together again on the case. On January 25th, the day after our first hearing I prepared a small memo for the file which I'll read to you, it may be of help.

Private Cassidy stated that over the years he has been injured from one degree or another in the line of duty but had never made routine Police incidentals of some of these incidents. Now if you disagree with anything [2] just say so. He claimed a high degree of susceptibility to fatigue, to the point where irrespective of his alleged back and neck trouble, he feels he can no longer perform satisfactory police duty. He had no explanation for this fatigue however, other than in relation to his back trouble. His sick record indicates a steep climb in his use of sick leave since an application that he made in August of 1962 for transfer from #4 Precinct to #10 Precinct was disapproved by Captain Richardson of number four. Prior to such disapproval his sick leave record was normal or even less than normal. Also in his disapproval, Captain Richardson of number four indicated that in his belief, Officer Cassidy was mentally confused and unsure of himself. On a motion by Mr. Umstead, seconded by Deputy Embrey, the Board referred Mr. Cassidy back to the Board of Police and Fire Surgeons for further

study, both physical and psychiatric. His attorney, Mr. Margolius, agreed that further study by doctors was indicated in order that the Board might arrive at a just and reasonable decision in the case.

Dr. Mensh, do you have further information for the Board?

Dr. Mensh: Yes. This is a memorandum dated February 8, 1963, to the Police and Firemen's Retirement and Relief Board to Dr. B. F. Dean, Chairman of the Board of Police and Fire Surgeons, concerning Pvt. James J. Cassidy, Fourth Precinct, Metropolitan Police Department. This is a report signed by Dr. Hyman D. Shapiro, Member, Board of Police and Fire Surgeons.

"Private Cassidy was referred to the undersigned by the Retirement and Relief Board for neurologic and psychiatric evaluation. This, following hearing testimony in his case before that Board on January 24, 1963, when he was being considered for retirement on the basis of recommendations of the Board of Police and Fire Surgeons for a disability of "arthritis, lumbosacral spine".

I first examined Private Cassidy on January 31, 1962. He was then forty years old and had been appointed to the Police Department on May 1, 1951. The following history was elicited from him:

Chief Complaints: "Pain in the lower part of my back and left side of my neck". He stated his back pain was of "almost two years' duration and that his neck had been bothering him for "the past three months".

Family History: Is non-contributory, except that he has one sister who has been in a New Jersey State Mental Hospital for twelve years.

Marital History: He was married in 1955. Wife is thirty-four and in good health. They have three children, ages seven, four and three; all in good health. Marital adjustment is reported as "fine".

Social History: He was born in Jersey City, New Jersey on March 27, 1922. He resided there up to the age of thirty, when he came to D.C. He stated he quit schooling in his first year of high school at the age of sixteen. He repeated three grades. The reason for this was given by him as, "I was a little backward, I guess. I have a brother who is a Ph.D. but this never

rubbed off on me". He states that all of his schooling, except the one year of high school, was in parochial schools. He was never a disciplinary problem in school.

After leaving school, he was a Western Union Messenger for one year and then worked for one year as a messenger in the office of the Subway System, and then was a clerk for them for one year until he enlisted in the [3] Army in September, 1940. He was honorably discharged as a Corporal in October, 1945. He was overseas with the Infantry for three and a half years in the Pacific, and had considerable combat, but no injuries. He stated he got along fine in the service, except that he was given a Court Martial in 1943, for being AWOL for three days. "I was overseas and just before we got into action I wanted to have a good time. I went on a drunk and had a good time. I was fined \$100".

After discharge from the Service he returned to his position as a clerk in the Subway System and left there after three years for a better job as a caretaker, Federal Employment, in the National Guard Armory in New York City. He left there after two and a half years and then he had an odd job as a dock worker and as a guard up to the time he entered the Department in May, 1951. He has been in the Department ever since. In the Department he stated he had one Trial Board action, he believes in 1953, when he got drunk off duty and was fined \$75. No other Trial Board actions. (The records show that he was suspended from duty on January 12, 1953 without pay, effective that date, and on January 29, 1953, tried by a Police Trial Board on the charges of "Being under the influence of intoxicating beverages while off duty". Found guilty and fined \$75. Restored to duty, the period of suspension to be without pay, effective January 29, 1953).

Developmental History: He denied any neuropathic traits and stated he was never considered nervous.

Habits: He used cigarettes up to eight years ago and none since. "I just gave it up". As regards the use of alcohol, he stated that, "I still drink". When asked to explain this, he stated, "I have drank to excess from 1940, when I was in the Service up to now, I suppose. That is my

wife says I do. Yes, I realize I do. Have not had a drink for the past three days". When asked his alcohol consumption, he states at time he may drink as much as a pint in twenty-four hours. At other times, he drinks beer. The last time he drank a pint in 24 hours was during the Christmas Holidays. His usual consumption, he stated, is an average of six to twelve beers a week. I then again asked him how he gets along with his wife in view of his previous statement that he got along fine with her and later that she was alleged to have stated that he drank too much, his answer was, "I do not get along with her at times when I drink too much".

Previous Illnesses: Had a broken collar bone at the age of eight. No further major illnesses up to his Military Service, when he stated he was hospitalized in Okinawa for eight to ten days for a "nervous stomach", and another time for hemorrhoids. He states he has been bothered with his stomach off and on since then. He has never filed a claim with the Veterans Administration. Since being in the Police Department he states that the first time, in November 1960, he was injured when, while training a dog, he fell and hurt his leg and back. At that time he came to see Dr. Esch about his nervous stomach and told him about the back and he was sent to Dr. Harrell because he, at that time, had bruises on his face. He stated Dr. Harrell told him to file an incidental for this. He stated he has come to the Clinic off and on over the years for treatment of his "nervous stomach". A review of his Master Sick Card shows that he lost nine days in January 1952, for fracture of the 5th metacarpal, right hand. He states this occurred while off duty, when he fell down a flight of stairs carrying a foot locker. He has a number of entries for treatment for "acute colitis" by Dr. Reed. He lost two days from this in February, 1953 and one day in July, 1954. He lost one day in August, 1958, for acute enteritis and three days for diarrhea in December, 1958 (Dr. Claudy). He lost two days in [4] December, 1959 for gastroenteritis (Dr. O'Keeffe). His subsequent treatment was by Dr. Esch and shows he lost one day in April, 1960 for acute gastroenteritis; two days in November, 1960 for gastroenteritis. There are no further entries for any gastrointestinal disability. There is no reference to any functional or "ner-

vous stomach" entered on his Master Sick Card. His other entries are mainly for upper respiratory infections. It shows he lost one day in October 1956 for a contusion and abrasion of his right leg on duty and three days in April, 1958 for lumbosacral strain, and again four days in July, 1961 for an acute lumbosacral strain. The first entry for any arthritic condition is a loss of eight days in June, 1962 for rheumatoid disease and ten days for a similar condition in August and September, 1962 (Dr. Esch). He also lost five days for "observation" in September, 1962 (Dr. Esch).

A review of his Clinic Medical Files shows that he had a stool examination on February 12, 1962, which was faintly positive for blood. In September 1962, he had a complete chemical blood examination in the Oscar B. Hunter Memorial Laboratory with negative results, except that he showed a uric acid of 8.9 mg. per 100cc. (Normal:2-6 mg.). An x-ray of his lumbosacral spine on November 15, 1962 shows "minimal osteophytic changes of the lumbar spine". The x-ray of the left knee was negative. His surgical file shows he was seen by Dr. Harrell on January 1962, with a history of being off nine days in July 1961, for lumbar-strain under Dr. Esch. "Present episode started at home 1-16-62-so acute he couldn't stand. Today can't straighten. No radiation. Points to C4 - no tenderness. No radiation. Lists to right but can bend left. Bends forward with acute distress. Rotation cause cry. Straight leg and reflexes normal. Seems acute rheumatoid - states he had a fever - To x-ray - Sed. rate - Butozaldin". He was next seen by Dr. Harrell January 22, 1962. His sed. rate was up (28mm. in 60 minutes). Reference was made to his x-ray report and Dr. Harrell reports "All supporting diagnosis of rheumatoid disease. Talked with Dr. Esch who will continue care". He was next seen by Dr. Harrell on June 15, 1962, with a history that on June 9, 1962, he developed acute neck pain which is now down across the lumbar area. So now can't bend forward. Brings in uric acid and ordered by Dr. Esch which is 5.55 mg. To order Butozaldin. Exam. - plus sed. rate confirms probability this is rheumatoid". Was last seen by Dr. Harrell on September 21, 1962, with a history "After driving from New Jersey developed exacerbation of lumbar pain and also stiffening in

neck. In view of generalized picture, elevated uric acid and usual response to medication, I feel this is rheumatoid". There are two incidentals in his file as follows: November 16, 1960 - had injuries, laceration to face, left hand and left knee when he fell on gravel surface on duty at the dog training center, running for a dog on the attack. Seen by Dr. Harrell in Clinic on November 18, 1960, for lacerations to face, left hand and left knee. The other incidental of July 25, 1961, reports an injury on July 15, 1961, in negotiating a track and free search with his Police dog, it became necessary to jump over an anchor fence and as a result injured his back. He was seen by Dr. Esch in the Clinic and it was stated that the above was noted and he was returned to duty July 24, 1961, with no disability. I note also an x-ray of his lumbosacral spine, dated January 19, 1962, showed "some straightening of the spinous nodes in the lateral view and there are minimal osteophytes on the anterior margins of the bodies of the vertebrae".

Present Complaints: He stated that outside of his back and neck he has no disability other than his "nervous stomach", which he states he has had ever since his Military Service and is manifested by gas, belching rumbling, at times, "but not much pain". He stated he was treated at the Clinic for this off and on for years. He has had no GI Series. When asked if he was nervous, he stated, "I don't think so". When I asked if that included his nervous stomach and he answered, "I have had it since I was in the Service, I don't consider myself as nervous".

[5] I had this man return for further examination including neurologic on January 7, 1963. At that time he told me that he had a "numb sort of pain" at the tip of his tailbone when he does any considerable lifting or walking. He amplifies that by stating "When I put my heels down after walking a few hours I feel this numbness at the tip of my tailbone. It is no real pain, except when I have my bad attacks. When I have to come to the Clinic then the medicine they give me does not help it. Then the pain goes on across my lower back and I can't straighten out and I get cocked over to the right". He stated that the top of his neck and the left side of his neck have been stiff lately. He estimates this as about three months' duration.

Neurologic Examination: Station and gait, including walking on heels and toes, are normal. I could detect no muscle spasm in his back. Forward bending was not limited but he stated it caused some stiffness in his lower back. He got on and off the examining table without any difficulty. Straight leg raising performed very freely and without any resistance or pain. His knee jerks and ankle jerks were both active and equal. The sensory examination was completely negative. He had a very ruddy face.

Diagnosis: No evidence of neurologic or psychiatric disease.

Note: Since my examination, I have noted a report of orthopedic consultation by Dr. Julius J. Radice, dated February 6, 1963. Copies of this are attached. I note that he makes a diagnosis of "Mild arthritic changes". Respectfully submitted, Hyman D. Shapiro."

There are also a letter from Dr. Julius Radice, Orthopedics, dated February 6, 1963 to Dr. Victor Esch.

"The above-named patient was examined in my office on February 1, 1963, at which time he complained of pain in his low back.

Mr. Cassidy stated that he had been injured on duty on several occasions while working with the dogs for the Metropolitan Police Department in 1961. He stated he had several episodes of pain and discomfort with his back in the interim and had received heat and medication from the Clinic. He is now with the foot patrol, having given up the dogs.

X-rays at the Washington Hospital Center on 1-19-62 were reported as follows:

Examination of the lumbosacral spine shows no evidence of fracture or dislocation. There is some straightening of the spinous nodes in the lateral view and there are minimal osteophytes on the anterior margins of the bodies of these vertebrae.

Examination of the lumbar and sacral spine shows no evidence of fracture or dislocation. The intervertebral disc spaces and articular facets are preserved. There are minimal osteophytic changes of the lumbar spine. Both sacro-iliac joints appear normal.

Examination of the left knee shows no abnormality of the bones or joints.

On physical examination, on standing, there was a little dorsal kyhosis. Some straightening of the lumbar spine was noted. Slight paravertebral muscle tightness was present. There was no tenderness on pressure. No pain was described in the lower extremities. Forward bending was well done without pain. Lying on back and abdomen, both flexed knee and straight leg raising was well done. Knee jerks and ankle jerks were present and active. There was no loss of sensation and no numbness.

The patient talked at great length regarding his several episodes of back injury and recurrent attacks of back pain, but the patient's described symptoms of disability certainly do not coincide with the physical findings in my examination, which are essentially negative at this time. The patient is entirely pain free at this time.

[6] Diagnosis: Mild Arthritic changes. Very truly yours, Julius J. Radice, M.D."

Mr. Richardson: Dr. Cliff, do you have any questions relative to this report?

Dr. Cliff: No, I have no questions about the report with one exception. I didn't quite catch what was said about him falling down some stairs with a trunk.

Mr. Margolius: He broke his hand.

Pvt. Cassidy: I broke some bones in my hand.

Dr. Cliff: You didn't hurt your back?

Pvt. Cassidy: No sir.

Dr. Cliff: Was that on duty or at home?

Pvt. Cassidy: No, that was at home.

Mr. Richardson: Is there any residual damage at this time?

Pvt. Cassidy: Well — I get a pain now and then, more so lately than I have had. This happened ten to eleven years ago.

Mr. Umstead: Indicating your right hand?

Pvt. Cassidy: Yes sir.

Dr. Cliff: I have no further questions with reference to the reports.

Mr. Margolius: Doctor — the chief complaint was pain in the lower

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Mr. Margolius: Doctor — the chief complaint was pain in the lower

part of my back — as reported here in the report. Now there's no question that a person can have pain and not have an objective sign during examination. That's a fact, isn't it? The pain can be subjective.

Dr. Mensh: Yes —

Mr. Margolius: I know that there is this complaint and in the examination of Dr. Radice, he finds no objective evidence of the substantiated complaint but in the absence of the objective finding it doesn't necessarily mean that the subjective complaint is in balance. Or does it?

Dr. Mensh: I think that's generally true but it always of course, is something that requires evaluation. Then you have to consider in the absence of any objective findings the threshold of the patient and a whole number of things, very difficult —

Mr. Margolius: Well the reason I'm asking these questions is this. Cassidy is before the retirement Board because the Board of Police and Fire Surgeons says that he is unfit for duty, that he's disabled because of disability arising from — based on the diagnosis of traumatic arthritis of the lumbosacral region. If I was sitting on the Board and I heard the last two reports that was submitted — which stated, Dr. Radice didn't find anything [7] except some arthritic changes. Dr. Shaprio didn't find anything except some arthritic changes. In light of the last two reports does the report originally submitted, diagnosis, traumatic arthritis of the lumbosacral region coupled with the facts that "it is my opinion that it will not be possible to rehabilitate Pvt. Cassidy to active Police work. It is therefore recommended that he should appear before the Retirement Board." Now these — any of these instances —

Dr. Mensh: No, I don't think their inconsistent, I don't think they are necessarily inconsistent at all.

Mr. Margolius: Then as of this minute, it is still the opinion of the Board of Police and Fire Surgeons that he should be retired because of traumatic arthritis of the lumbosacral pain.

Dr. Mensh: We said that this man couldn't work, the man didn't work. I can't say whether he didn't or couldn't or wouldn't. I don't know.

Mr. Margolius: Well if he couldn't or wouldn't or didn't — didn't or couldn't are two different things. If he couldn't then there's a basis for the didn't but if he wouldn't — then there's no basis for the didn't. In other words, wouldn't would be malingering, couldn't would be real.

Dr. Mensh: I can't say whether the man couldn't, wouldn't or didn't, all I know is the man didn't and as a result of not working he had to appear.

Mr. Margolius: Then — well there's two alternatives before the Board of Police and Fire Surgeons. One is the Retirement Board and the other is Trial Board. When a man can and won't then he's malingering, if he can't and don't then he's sick. Isn't that the substance of it — I don't want to debate this with you but what I'm trying to find out is that the opinion of the Retirement Board of the Board of Police and Fire Surgeons is that he should be retired for disability?

Dr. Mensh: We recommended that he come down here to appear before the Retirement and Relief Board for their consideration and the facts as we saw it was the facts that we wrote.

Mr. Richardson: Mr. Margolius would you read the copy you have there from the Board of Surgeons.

Mr. Margolius: Yes. Private James J. Cassidy, this is written by Dr. Esch, Private —

Dr. Mensh: He wants the last paragraph.

Mr. Margolius: Oh, "It is my opinion that it will not be possible to rehabilitate Private Cassidy to active Police work. It is therefore recommended that he appear before the Retirement and Relief Board for consideration for retirement. The diagnosis is traumatic arthritis of the lumbo-sacral region." Preceding this is the history of injuries incurred in the line of duty.

Mr. Richardson: Of course the word rehabilitation is there's implication there that there has to be something to be rehabilitated from. So there is physical disability in the opinion of the Board of Police and Fire Surgeons?

[8] Mr. Margolius: Now — the thing that I'm trying to clear up for the

record is any possible implication that may exist as a result of negative objective signs at any given time. That does not mean that a man who is lacking in signs at any particular time — has no condition. I don't know whether I'm going around in circles or not. What I'm trying to point out to the Board is that he is here not because he filed a suit or claim so to speak to try to prove a disability. He's here because the Board of Surgeons sent him here.

Mr. Umstead: Based upon his failure to work.

Mr. Margolius: Based upon the history known to the Board — examination by the Board and orders of the Board not to work. Now — from the diagnosis doctor, of traumatic arthritis, that indicates does it not that the arthritis is a result of trauma of a injury?

Dr. Mensh: That's what the word says.

Mr. Margolius: And throughout this there's rheumatoid arthritis spoken of. Now, there is in the file an original hearing, examination made, tests made which negative rheumatoid arthritis. Made as late as September — 1962, is this indicative to anything?

Dr. Mensh: Well I explained, I think at the last meeting when Mr. Cassidy was down, the term rheumatoid as used by a neurosurgeon or an orthopedic surgeon or even some general practitioners is a little different from the term rheumatoid as we use it. We reserve the term rheumatoid for rheumatoid arthritis, which is a specific entity. The term rheumatoid as their using it, should have been rheumatic rather than rheumatoid it being a non-specific term. There's no evidence that this man has rheumatoid arthritis according to the reports that I can read.

Mr. Margolius: Well that's what I wanted to know.

Dr. Mensh: There's no evidence of rheumatoid disease as far as I can see.

Mr. Margolius: In other words, the statement that rheumatoid arthritis as used in these reports is entirely consistent with the term rheumatoid arthritis?

Dr. Mensh: Consistent with the term rheumatic pain. Rheumatic disease of some sort but not rheumatoid. Which is strictly in our vernacular a specific entity, a specific disease process. This man does not have any evidence of rheumatoid spondylitis in his spine. Or rheumatoid arthritis in his hand, or other joints. When the neurosurgeon uses the term rheumatoid, he means that there's no evidence of mechanical disease and it's probably on a rheumatic basis. I don't know —

Mr. Margolius: This man hasn't worked since November. Knowing his condition, would that have any significance in the examination of February, where the pain is not evident to the doctors after three or four months rest? Is that significant to you?

Dr. Mensh: I don't know that I get the significance of your questioning. Do you mean the fact that he was off for three months —

[9] Mr. Margolius: The fact that he was off for three months before his examination and has done no hard work, or has done no work. Is that consistent with the fact of when he went off work in November he was suffering pain?

Dr. Mensh: I don't think that in my judgment would be true indicative of anything.

Mr. Margolius: Now next, based on the history that has been given — can you render an opinion as to whether or not this traumatic arthritis under the lumbosacral region is the result of the performance of his duties of a Policeman?

Mr. Umstead: I think this Mr. Margolius, as you know the alternate determination of whether or not it's in the line of duty or not in this Board. Now the doctor, if he has any specific facts before him, from which he can draw a legitimate medical opinion of his own, he certainly can give as to the correlation between any problem which he knows about and any result therefrom.

Mr. Margolius: I said, based on the history given.

Mr. Umstead: I understand but Dr. Mensh is having difficulty as to whether or not he should answer the question.

Dr. Mensh: Restate the question.

Mr. Margolius: Based on the history as given here — of the course of these injuries as related in the record before you. Can you give an opinion as to the relationship of those injuries — can you state whether or not this traumatic arthritis was the result of his performance of duty?

Mr. Umstead: No, the question was Mr. Margolius, can you state whether or not these injuries are the cause of his present disabling condition, if he has one. An opinion that he is disabled.

Mr. Richardson: Will you accept that rephrasing of —

Mr. Margolius: No — I won't accept whether or not he had the opinion of disabled.

Mr. Umstead: The alternate determination as to whether it's line of duty or not, belongs to this Board, not the doctor.

Mr. Margolius: Well I disagree with that because the Court of Appeals just told you you were wrong.

Mr. Umstead: That may well be, but we have that function to perform. I have no hesitancy to your asking him the question, whether or not there is a connection in his opinion medically as approximate cause between the things that you say happened in the history and the present condition which he has. If he has any condition.

Mr. Margolius: You're a member of the Board of Police and Fire Surgeons as related, right?

[10] Dr. Mensh: Yes.

Mr. Margolius: You passed on the sending of this — passed on the question of sending this case to the Retirement Board right?

Dr. Mensh: Yes.

Mr. Margolius: And you concur in the opinion of the Board of Police and Fire Surgeons as to whether this man is disabled?

Dr. Mensh: We passed unanimously that this man should appear before the Retirement Board.

Mr. Margolius: Now — based on the injuries — which have been testified to as being sustained by — in the line of duty, do you have an opinion

as to the cause or relationship those injuries to the diagnosis and findings of traumatic arthritis?

Dr. Mensh: I would like to state that I can't, with all certainty and this is my own personal opinion, I'm not talking for the Board of Police and Fire Surgeons, I can't with certainty, understand how one can differentiate ordinary degenerative change from "traumatic change in the back, I don't know how they differentiate this from a radiologic standpoint, unless there is obvious fracture and then deformity as a result of fracture".

Mr. Margolius: What significance do you attach to injuries?

Dr. Mensh: I — in some instances you can be very specific with regard to injury and subsequent development of problems. I can't for certainty state that the changes that are noted in his vertebrae were directly related to the injury that he sustained. I don't say that they are not, but I can't say that I can say with certainty that it is. Since his pain is predominantly subjective in the absence of objective orthopedic and neurological findings — this of course — constitutes the difficulties in determination as to whether or not this was related to the injury. So much so, that the Board agrees that this man should appear before this Board — since this man was not able to work.

Mr. Margolius: Assuming that the onset of these symptoms was November of 1960 when he sustained the physical injury. That was the beginning of the symptoms which now exist, upon which the Board — your Board predicates the reference to this Retirement Board. Is the fact that he was without symptoms before November of 1960 and had had them since 1960 — give any significance to a medical opinion?

Dr. Mensh: It would certainly appear time wise that this is a factor and it is assumed by the Board that this was a factor.

Mr. Margolius: Alright, let's assume doctor regardless of the cause — of the condition this man is suffering from, whatever caused it, can you state with brief a medical surgeon not as a mathematical surgeon, that his condition has been aggravated by Police duty?

Dr. Mensh: Well you're predicating that he's got a condition and that if he has a condition that would this condition be aggravated by police duty?

[11] Mr. Margolius: Yes.

Dr. Mensh: I would think so, yes.

Mr. Umstead: Doctor, let me just ask one question. Is it or is it not absent objective findings when a man says what he has obtained?

Dr. Mensh: Start that over again. Is it or is it not —

Mr. Umstead: Is it or is it not absent objective findings, neurological, orthopedic, x-ray or anything else, extremely difficult for a doctor to state when a man says he's got pains, that he is in fact malingering?

Dr. Mensh: This is again a personal opinion. If the patient tells me he's got pain, I assume he's got pain whether I find the reason for it or not and I find the same problem in patients with backaches as I do with patients with headaches or in patients with dizziness. These are three complaints which are extremely difficult to evaluate and I'm perfectly certain that any physician would have a great deal of difficulty in stating that a patient doesn't have, if he says he does and he's allowing himself to be put in a very uncomfortable predicament to make a flat-footed statement that a patient doesn't doesn't when he says he does. The presence of absence of changes in the spine, such as exists in this, you can see in thousands and millions of people who have no complaint at all. So it's presence of absence by x-ray in itself doesn't mean much. I find a great deal of difficulty personally in arriving at a conclusion when a patient tells me, I'm suffering with intractable headaches and saying you don't have headaches. Or when a patient says, I've got backaches, I say you don't have a backache, I could never say that.

Mr. Umstead: And likewise too, when you indicate the hundreds and thousands of persons having the same type of changes that this man has, you still can't say nah. By the same token you cannot be certain as to his motivation or lack of motivation to continue on a particular course of employment, can you?

Dr. Mensh: I would have no way of knowing.

Mr. Umstead: That's all I have.

Mr. Richardson: Then it's fair to state then that this case was referred to the Board for consideration without any objective evidence of physical disability in facts but upon the basis of the Officer's statement that he did suffer pain and is incapable of Police Duty?

Dr. Mensh: I can't say that sir, because this man was sent down here with a diagnosis of traumatic arthritis and he does have changes by x-ray. I can't honestly make it a statement that you made. I was a part of that Board and that Board wrote that letter.

Mr. Margolius: In other words, there is a cause — there is a basis for pain, in other words, he has a condition that is pain causing? The affect causes pain doesn't it?

Dr. Mensh: Traumatic arthritis?

[12] Mr. Margolius: Yes.

Dr. Mensh: Traumatic arthritis can cause pain, I don't question that. This Board felt a reason to have this man re-evaluated. The evaluation, neurologically, physiologically, orthopedically was given and sent back for judgement based on the findings that were given.

Mr. Richardson: Cassidy, you reffered to the various reports, particularly the last two read into the record by Dr. Shapiro and Dr. Radice. What is your personal reaction to those reports, do you have any comments to make on them?

Pvt. Cassidy: Well — I have been without lack of pain at times, that's true, I go without pain but when I went to Dr. Esch I was in pain. When I went to Dr. Harrell, I was in pain. When I went to Dr. Radice, I didn't have any pain. When I went to Dr. Shapiro, I didn't have any pain at that time. I didn't lie to them, I didn't lie to the other doctors. If I couldn't straighten up, I couldn't straighten up and they couldn't straighten me up. So that's all I can say is that Dr. Esch diagnosed it the way he diagnosed it and as far as I'm concerned that Dr. Esch might be able to straighten it out better than anyone else. Of course, I feel this way, that Dr. Esch treated me, I had been to him on these attacks and he knew more about the particular

case than anybody else. So I say he could probably straighten it out better than I could. I have the pains and I have the symptoms.

Mr. Richardson: Well Dr. Esch, has of course met with the Board of Surgeons and anticipated in sending you here, he wrote that letter.

Dr. Cliff: You said you had no pain when you saw Dr. Radice and Dr. Shapiro?

Pvt. Cassidy: Yes.

Dr. Cliff: Well he saw you one month ago, January 24th. Do you feel there's been any major change in your condition over the last month?

Pvt. Cassidy: Well — right now, I mean yesterday and today, my neck is stiff, it's slightly sore even though there's no pain there but it's definitely stiff, it might be from a cold, I don't know. My back has slight pain, stiffness, no great deal of pain, I wasn't doing anything but it still has numbness.

Dr. Cliff: Would you say your condition changes from time to time? With the understanding that it does change, you probably couldn't tell from day to day whether you're getting better or not. But over the period of the last month do you think you're any better, the same or worse than you were two months back?

Pvt. Cassidy: I would say that I was better.

Dr. Cliff: Do you feel you are enough better to warrant waiting for another month or two to see how it turns out?

Pvt. Cassidy: Well if they feel I can do the job, I'm certainly willing to try it. I tried it before and I asked Dr. Esch at one point over a year ago if he thought it would be better if I had an inside job. He said it wouldn't make any difference. He said I would have this pain anyway.

[13] Dr. Cliff: If you should retire and if the condition should improve, how would you feel about going back to work?

Pvt. Cassidy: All I want to do is to get better, as far as work, I would have to do some kind of work anyway. I've worked hard all my life, I'm not afraid of working.

Dr. Cliff: Well we haven't voted yet so no individual here can say what the outcome will be but assuming that you are retired and say you come

back for a recheck in two years like the other men do — if your condition has improved in that time would you desire to come back to work?

Pvt. Cassidy: Well when I feel right and if I feel right, I'm welcome to go to work now if I feel up to it.

Dr. Cliff: We're not saying that you will feel better but I am saying that if you did, if you felt normal in two years, would you care to come back?

Pvt. Cassidy: Yes, sir.

Mr. Richardson: Do you feel that you could resume your police duties now?

Pvt. Cassidy: I don't know about all phases of police duties, I feel that I could perform some phases of police duties. I've walked all my life for a living since Western Union, I was sixteen years old and walking has been my liveliness but it's certainly no pleasure to walking anymore. I'm not saying that every step I take bothers me but it does bother me.

Mr. Umstead: Why do you want a desk job?

Pvt. Cassidy: Well I thought — well it would help me, it wouldn't be aggravated as much.

Mr. Margolius: Does prolonged sitting hurt you or —

Pvt. Cassidy: It has, not as much as walking though.

Mr. Margolius: Just sitting and getting up is not too bad? That is sitting and getting up, sitting and getting up?

Pvt. Cassidy: I didn't do so much of that at all. I worked in the Station maybe three times in the last year. I haven't done too much inside work.

Mr. Richardson: When you were on active duty and you began a tour of duty, say 7:30 in the morning or whatever time you started, was there a period of an hour, two hours, three hours or whatever that you felt adequate to your job and then you had an onset start —

Pvt. Cassidy: When I got a rest, a good rest, I felt a lot better. Just getting off of my feet but when I started to walk again it would get me right

on the base of the spine, a sharp pain. Not necessarily just in the back but on the spine but when the stiffness comes that comes —

[14] Mr. Richardson: Well you've spoken of the base of your spine so much, I don't recall your having spoken of any radiation of pain down —

Mr. Margolius: There is no radiation of pain.

Mr. Umstead: Mr. Cassidy, you seem rather supple at the moment in moving about, are you rather supple at the moment?

Pvt. Cassidy: Well my neck bothers me, that's about —

Mr. Umstead: Your neck's bothering you right now?

Pvt. Cassidy: It's slightly stiff, I've had a cold —

Mr. Umstead: You mean you can't turn your neck?

Pvt. Cassidy: I can turn it, yes, sir.

Mr. Margolius: Of course, I've got to object for the record for your diagnosis from the other side of the table.

Mr. Umstead: Mr. Margolius, you sat next to the man, you saw him move around in his chair. Unless you weren't looking?

Mr. Margolius: I wasn't looking.

Mr. Umstead: Mr. Cassidy are you under medication at the present moment?

Pvt. Cassidy: No.

Mr. Umstead: How long has it been since you've been under medication?

Pvt. Cassidy: From the clinic? I'd say probably — it be four months.

Mr. Umstead: Taking nothing whatsoever?

Pvt. Cassidy: No tonics or any pain —

Mr. Umstead: Any pills?

Pvt. Cassidy: Just aspirin. I have some butazolidine, that's all I've got.

Mr. Richardson: Mr. Margolius, do you care to sum up your client's case?

Mr. Margolius: This is one of these cases which comes before the Retirement Board and presents a issue that on the surface looks like it's

one that the man should not even be before the Retirement Board because he's had two examinations by doctors who say that they find no pain objectively at a time but also presents a picture of the finding of the doctors who have been treating him, that he is a candidate for Retirement. Now I know the this Board can send a man back to work. I understand the ruling of the Board of Commissioner's. I think the choice exists of this Board, is whether or not he goes back to work as of now or whether [15] or not he retires with disability in line of duty. Whether this condition is caused by his work or the work aggravates his condition. I am the last person, speaking personally, I am the last person to question anybody's subjective complaints. I have been before this Board on numerous occasions and I've had occasion to cite one previous case of a Policeman who had every possible neurological test known to medicine and they could find nothing wrong with this man. This man however had had a headache, still has a headache and is today is a subject of treatment of the NIH to seek the cause or the basis for that headache. Yet this man was hurt approximately ten years ago and yet he has nothing but his subjective complaint of the headache. In light of that case I'm the last person in the world to minimize subjective complaints. Now Cassidy didn't come here because he says, let me go, let me come here, he came here because the Board of Police and Fire Surgeons sent him here. If he is not telling the truth — then of course he doesn't belong here he belongs before a Trial Board. I think those are the two alternatives as to whether or not he's not telling the truth, so we must assume he is telling the truth. At least assume for the purpose of this hearing, there's no basis for determining he's not telling the truth. If this Board feels he ought to go back to work — I for Cassidy will say this, it is for the doctors in the last analysis to say whether or not he's fit for work. This Board can send him back to work, if the doctors tell him he can go back to work, then he'll go back to work. There could be some valid objections to a man going back to work when his doctors say he shouldn't go back to work because if he's not fit to work then he jeopardizes his own life. In the case of any emergency where he can't face a situation for example and he's physically un-

fit, he may suffer gross physical damage or harm. So — while he does not have the say, it's for the doctors, if the doctors tell him he is fit, he has no choice he must go to work. The doctors haven't said that, they have sent him here for retirement, they say he is unfit for duty. If he's unfit for duty, then I think it's necessarily follows that his work as aggravated caused or aggravated his condition. I think it's that simple. I don't know Cassidy, I don't know him from Adams, this is my first experience with Cassidy here. I don't say this because I'm representing him but I can't as an individual say that he is free of pain. On the other hand I can't say that he has pain but I think that when he says he has pain, I think before we can find that he doesn't have pain, there's got to be a basis for it. I think that's the simple fact and as I started to say, these cases offer some troubles, some problems in the equity of the thing so to speak because here's a man that's been examined and the doctors can't find any basis for the pain. So we say, why should he retire, that's the matter for what the law covers of course. I think under the law and under the facts that have been given, he's a candidate for retirement in the line of duty. I further believe that the Board of Surgeons gave him a fair time, from November until January to see whether or not he should should retire. Apparently they did not send him to the Retirement Board the first week or month after he was off on sick leave, apparently they gave him time. Dr. Esch had him under observation for a long period of time and it is Dr. Esch, since he did have him under observation for a long period of time, he is the one who's opinion I think should receive some strong exceptions. His was not a one time examination, his was a period of observation and I think his report is entitled to consideration. That's all I have.

Mr. Richardson: Thank you very much Mr. Margolius, Mr. Cassidy. We'll take the matter advisement and you will be advised.

(Witnesses excused).

[Plaintiff's Exhibit PX 7C]

F.D. 18.4696

POLICE & FIREMEN'S RETIREMENT & RELIEF BOARD

February 28, 1963

We, as members of the Police and Firemen's Retirement and Relief Board, concur in recommending the retirement (disability not incurred or aggravated by the performance of duty) of James J. Cassidy, a Private in the Metropolitan Police Department, effective from and after February 28, 1963.

/s/ Clyde C. Richardson
Deputy Chief, Administration &
Safety Div.

/s/ Lyman J. Umstead
Assistant Corporation Counsel, D.C.

/s/ John R. Barry
Chief Instructor, D.C. Fire Department

/s/ Albert L. Embrey
Deputy Chief of Police, Met. Police Dept.

Dissenting Vote:

The undersigned recommends that the applicant be returned to duty in a light duty status for a trial period before taking final action, but if such a position is not available, then the undersigned recommends retirement for disability incurred as a result of duty.

/s/ Arthur E. Cliff
Chief Health and Examining Service, D.C.

fit, he may suffer gross physical damage or harm. So — while he does not have the say, it's for the doctors, if the doctors tell him he is fit, he has no choice he must go to work. The doctors haven't said that, they have sent him here for retirement, they say he is unfit for duty. If he's unfit for duty, then I think it's necessarily follows that his work as aggravated caused or aggravated his condition. I think it's that simple. I don't know Cassidy, I don't know him from Adams, this is my first experience with Cassidy here. I don't say this because I'm representing him but I can't as an individual say that he is free of pain. On the other hand I can't say that he has pain but I think that when he says he has pain, I think before we can find that he doesn't have pain, there's got to be a basis for it. I think that's the simple fact and as I started to say, these cases offer some troubles, some problems in the equity of the thing so to speak because here's a man that's been examined and the doctors can't find any basis for the pain. So we say, why should he retire, that's the matter for what the law covers of course. I think under the law and under the facts that have been given, he's a candidate for retirement in the line of duty. I further believe that the Board of Surgeons gave him a fair time, from November until January to see whether or not he should should retire. Apparently they did not send him to the Retirement Board the first week or month after he was off on sick leave, apparently they gave him time. Dr. Esch had him under observation for a long period of time and it is Dr. Esch, since he did have him under observation for a long period of time, he is the one who's opinion I think should receive some strong exceptions. His was not a one time examination, his was a period of observation and I think his report is entitled to consideration. That's all I have.

Mr. Richardson: Thank you very much Mr. Margolius, Mr. Cassidy. We'll take the matter advisement and you will be advised.

(Witnesses excused).

[Plaintiff's Exhibit PX 7C]

F.D. 18.4696

POLICE & FIREMEN'S RETIREMENT & RELIEF BOARD

February 28, 1963

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/s/ Clyde C. Richardson
Deputy Chief, Administration &
Safety Div.

/s/ Lyman J. Umstead
Assistant Corporation Counsel, D.C.

/s/ John R. Barry
Chief Instructor, D.C. Fire Department

/s/ Albert L. Embrey
Deputy Chief of Police, Met. Police Dept.

Dissenting Vote:

The undersigned recommends that the applicant be returned to duty in a light duty status for a trial period before taking final action, but if such a position is not available, then the undersigned recommends retirement for disability incurred as a result of duty.

/s/ Arthur E. Cliff
Chief Health and Examining Service, D.C.

[Plaintiff's Exhibit PX 7D]

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of General Administration
Washington 1, D.C.

March 11, 1963

DISABILITY RETIREMENT
(Not in Line of Duty)

ORDERED:

That James J. Cassidy, a Private in the Metropolitan Police Department, having been found physically incapacitated for further duty by reason of disability not incurred or aggravated by the performance of duty as a policeman, is hereby retired, to take effect from and after February 28, 1963.

That James J. Cassidy is hereby directed to reappear before the Board of Police and Fire Surgeons and the Police and Firemen's Retirement and Relief Board within two years from the date of his retirement and within each two succeeding years thereafter until he shall be reached the age of fifty-five.

By order of the Police and Firemen's Retirement and Relief Board:

/s/ Clyde C. Richardson
Acting Chairman, Police and Firemen's
Retirement and Relief Board

Previous service claimed, but of no benefit.

[Plaintiff's Exhibit PX 8]

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Executive Office
Washington, D. C. 20004

February 26, 1964

Mr. Bernard Margolius
Attorney at Law
Suite 309 Wire Building
1000 Vermont Avenue, N.W.
Washington 5, D. C.

Dear Mr. Margolius:

Further reference is made to the case of Private James J. Cassidy, Metropolitan Police Department, who appealed from the decision of the Police and Firemen's Retirement and Relief Board that he be retired from further duty by reason of disability not incurred in or aggravated by the performance of said duty.

The case was the subject of an oral hearing before the Board of Commissioners on October 29, 1963, at which time you represented Private Cassidy. As you recall, on that day, the Commissioners, after hearing oral argument in the case, voted to take the matter under consideration. Subsequently, on Wednesday, February 12, 1964, the Commissioners, having heard the testimony and having reviewed the record, voted to sustain the action of the Police and Firemen's Retirement and Relief Board retiring Private Cassidy from the Metropolitan Police Department for disability not incurred in or aggravated by the performance of duty.

Sincerely yours,

— /s/ G. M. Thornett
Secretary
Board of Commissioners, D. C.

—

[Filed Sept. 1, 1967]

MOTION TO DEFENDANTS FOR SUMMARY JUDGMENT
AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT

The defendants hereby move the Court to enter summary judgment in their favor and to deny plaintiff's motion for summary judgment on the grounds that the pleadings, the transcript of two hearings before the Police and Firemen's Retirement and Relief Board, attached hereto as Exhibits "A" and "B" respectively, and the entire administrative record, all of which are incorporated herein by reference and made a part hereof, demonstrate that there is no genuine issue as to any material fact and that the defendants are entitled to judgment as a matter of law.

/s/ Charles T. Duncan
Corporation Counsel, D.C.

/s/ John A. Earnest
Assistant Corporation Counsel, D.C.

/s/ John H. Suda
Assistant Corporation Counsel
Attorneys for Defendants

[Certificate of Service]

[Filed Oct. 18, 1967]

ORDER

Upon consideration of the complaint filed herein, the motion of the plaintiff for summary judgment and the motion of the defendants for summary judgment, the memoranda of points and authorities cited in support thereof, and oral argument of counsel in open court on October 5, 1967, it is, by the Court, this 18th day of October, 1967,

ORDERED:

1. That the motion of the defendants for summary judgment be, and the same is, hereby granted.
2. That the motion of plaintiff, James J. Cassidy, for summary judgment be, and the same is, hereby denied.

/s/ John J. Sirica
Judge

[Certificate of Service]

[Filed Oct. 26, 1967]

NOTICE OF APPEAL

Notice is hereby given this 23rd day of October, 1967, that James J. Cassidy, plaintiff hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 18th day of October, 1967 in favor of Walter N. Tobriner, et al, defendants against said James J. Cassidy, plaintiff.

/s/ Carleton U. Edwards, II
Attorney for Plaintiff

BRIEF FOR APPELLANT

In the
UNITED STATES DISTRICT COURT
For the District of Columbia

No. 21,485

JAMES J. CASSIDY,
Appellant,

v.

WALTER N. TOBRINER, *ET AL.*,
Appellees.

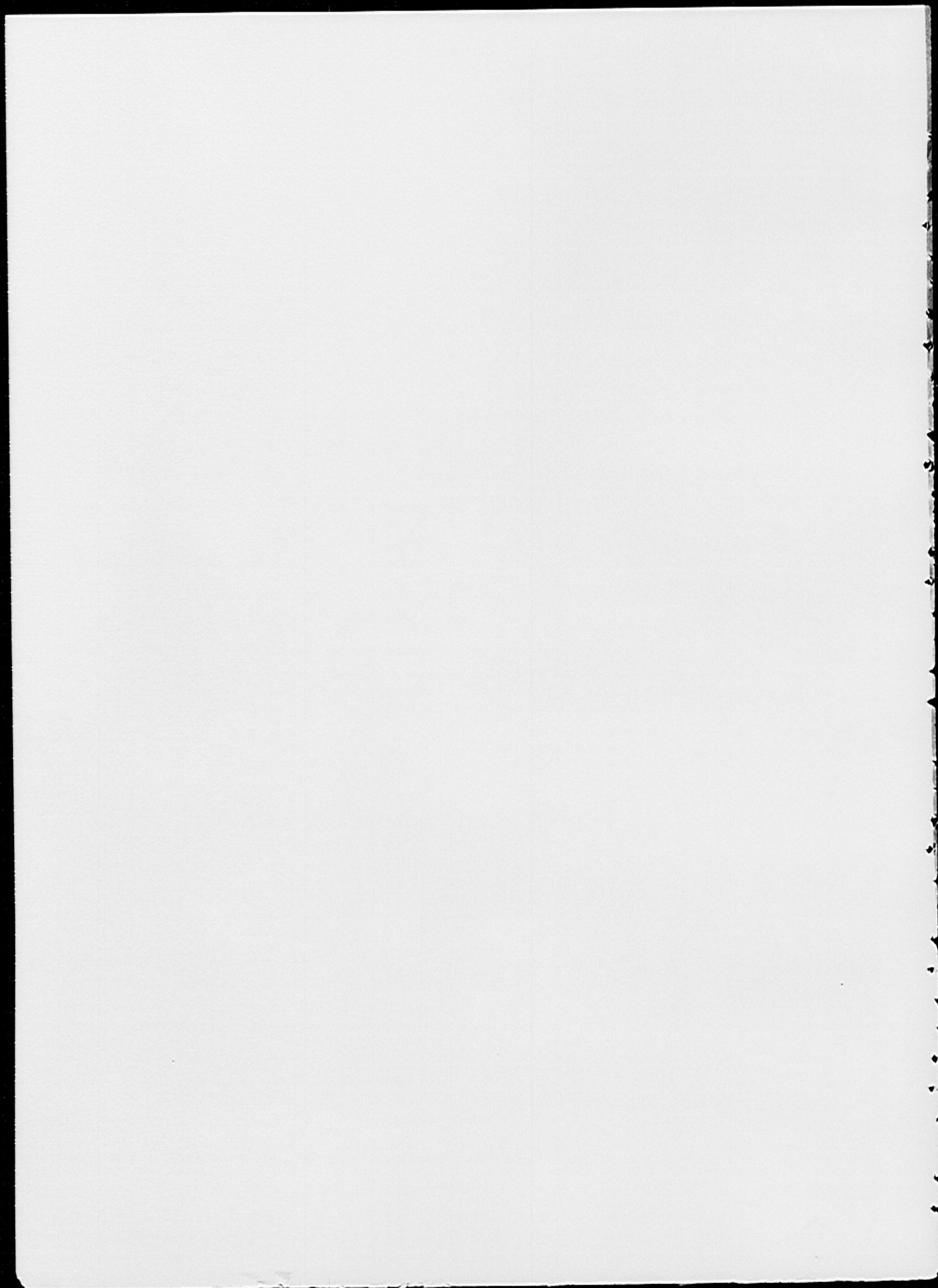
*APPEAL FROM A JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA*

United States Court of Appeals
for the District of Columbia Circuit

FILED JAN 25 1968

Nathan J. Paulson
CLERK

BERNARD MARGOLIUS
CARLETON U. EDWARDS, II
1000 Vermont Avenue, N.W.
Washington, D.C. 20005
Attorneys for Appellant



(i)

STATEMENT OF QUESTIONS PRESENTED

I. Whether the District of Columbia Board of Commissioners acted arbitrarily and/or capriciously in affirming the order of the Police and Firemen's Retirement and Relief Board of the District of Columbia, ordering the retirement of a Metropolitan Police Officer, for disability not incurred or aggravated in line of duty, under D.C. Code Title 4-526, when the evidence and the law required a finding by the Commissioners that he had become disabled due to back injuries contracted in/or aggravated by the performance of duty.

II. Whether in a Retirement Board hearing resulting in an officer's retirement for disability not incurred or aggravated in line of duty, the police department sustained its burden of proving that a police officer's disability was *not* incurred in/or aggravated by duty, and whether the *doubts*, (if any) were improperly resolved *against* the police officer in said hearing, where the police department physicians implied and indicated that the officer's disability was attributable to duty, and there was no medical testimony that said condition was not attributable to duty.

III. Whether the granting of excess sick leave and payment for "outside" medical services by the D.C. Board of Commissioners (for the same condition for which they retired appellant for disability not incurred or aggravated in line of duty) was recognition that appellant's disability was incurred or aggravated *in* line of duty.

IV. Whether the D.C. Board of Commissioners had the authority to change certain provisions of D.C. Code Title 5, enacted by Congress by promulgating "Amended Reorganization Orders".



TABLE OF CONTENTS

JURISDICTIONAL STATEMENT	1
STATEMENT OF THE CASE	2
STATUTES AND REGULATIONS	11
STATEMENT OF POINTS	17
SUMMARY OF ARGUMENT	17
ARGUMENT	
I. Appellees' Action in Granting Appellant Excessive sick Leave, Etc. Was an Acknowledgment That Appellants' Condition Was Contracted in Line of Duty	19
II. The Retirement Board and Appellees Ignored the Evidence and Improperly Retired Appellant for Disability Not Incurred in Line of Duty Rather Than for Disability Incurred (or Aggravated) in Line of Duty	20
III. Under the Liberal Attitude of This Court in Retirement Cases and the Case of <i>Blohm v. Tobriner</i> , the Appellees Have the Bur- den of Establishing That Appellant's Disability (Which It is Agreed Exists) Did Not Result From Performance of Duty (or Aggrava- tion by Duty), Which They Have Failed To Do	23
CONCLUSION ...	26

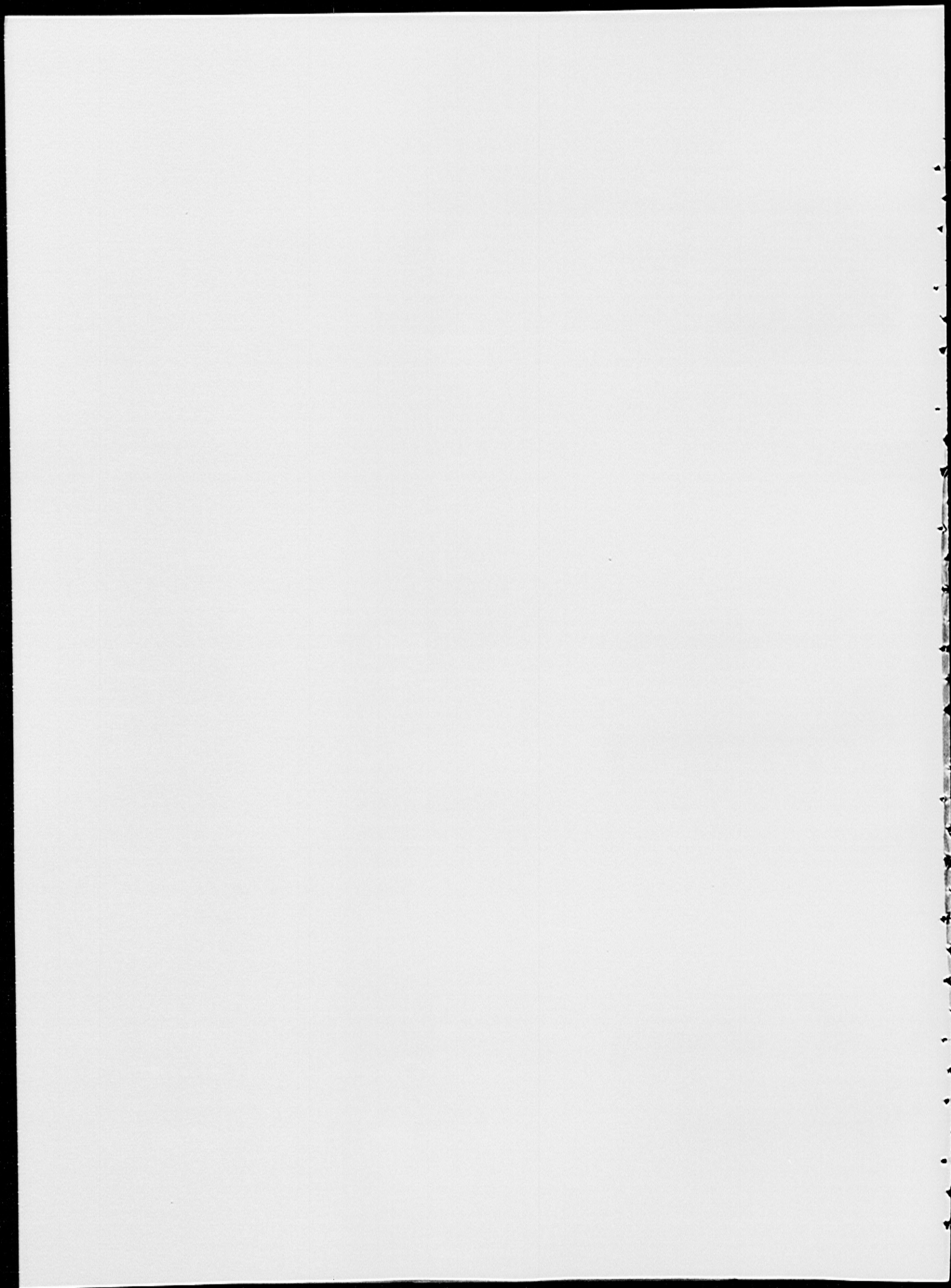
TABLE OF AUTHORITIES

CASES:

<i>Blohm v. Tobriner</i> , 122 U.S. App. D.C. 2 (1965)	20, 23, 24, 26
<i>Carroll v. Tobriner</i> , 223 F. Supp. 87 (1966), affirmed C.A.D.C. No. 20,141	20
<i>Crawford v. McLaughlin, et al.</i> , 109 U.S. App. D.C. 264, 286 F.2d 821 ...	22
<i>Graham v. Tobriner</i> , U.S.D.C. No. C.A. 1291-62	19
<i>Hyde v. Tobriner</i> , 329 F.2d 879, 117 U.S. App. D.C. 311 (1964) ...	19, 24
<i>Monica v. Tobriner</i> (1966), 253 F. Supp. 851	26
<i>Sentilles v. Inter-Caribbean Shipping Corp.</i> , 80 S.Ct. 173, 4 L.ed. 2d 142 (1959), reversing 256 F.2d 156 (5th Cir. (Fla.) 1958).....	23

STATUTES:

Title 4 D.C. Code (1951 Ed.), Secs. 4-521 thru 4-535	20, 21, 25
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In the
UNITED STATES DISTRICT COURT
For the District of Columbia

No. 21,485

JAMES J. CASSIDY,
Appellant,

v.

WALTER N. TOBRINER, *ET AL.*,
Appellees.

*APPEAL FROM A JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA*

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a final judgment of the United States District Court for the District of Columbia denying appellant's motion for summary judgment and granting appellees' cross-motion for summary judgment entered on October 18, 1967 (JA 91). This appeal was filed October 26, 1967 (JA 91).

This Court has jurisdiction by virtue of 28 U.S.C. Sections 1292, 1294 and 2106 to review the judgment of the Court below.

The complaint filed in the Court below was for a Mandatory Injunction Directing Retirement of Police Officer for Disability Incurred While Performing Duty and Directing Reversal of the Order Retiring Police Officer for Disability Not Incurred in Performance of Duty (JA 2), alleging in substance that the Commissioners of the District of Columbia acted arbitrarily and capriciously in affirming the order of the Police and Firemen's Retirement and Relief Board in ordering the retirement of appellant, a member of the Metropolitan Police Department of the District of Columbia for disability not incurred in the line of duty. Jurisdiction in the Court below is based on Title II, Section 306 of the D.C. Code, 1951 Edition.

STATEMENT OF THE CASE

(War Combat Duty, "OK for Appointment," and Appointed) Officer Cassidy, was born March 27, 1922. He had service in the United States Army from October 15, 1940 through September 20, 1945, with 3½ years in the Pacific, considerable combat but no injury (JA 28, 68). On March 6, 1951, he was examined by the Board of Police and Fire Surgeons and found "OK for appointment" (JA 13). He was *appointed* to the Metropolitan Police Department May 1, 1951, served eleven years and nine months.

(Officer Sustained Injuries in Line of Duty) Officer Cassidy's "Master Sick Leave Card" (JA 14-15) shows those injuries and conditions for which he was treated at the Police and Fire Clinic where sick leave was granted. This sick card shows the various conditions for which Officer Cassidy was treated at the clinic between January 16, 1952 and October 20, 1962. (Unless *sick leave* is granted as a result of the condition for which he was treated, the treatment would not be listed on this card). Some of the pertinent entries

included on this card are as follows: 1/16/52 – fractured 5th metacarpal right hand; 10/15/56 – treated for contusion and abrasion of the right leg on duty, one day sick leave; 4/4/58 – “*L.S. strain*,” three days sick leave (this is the 1958 incident discussed in JA 33, when a scuffle ensued where a citizen was interfering with firemen); 7/18/61 – “*Ac. L.S. strain*,” four days sick leave (this is the incident mentioned on incidental at JA 17 when appellant on 7/15/61 *jumped over a fence with a police dog at the scene of a yoke robbery, fell and injured his back*); the entry for 1/16/62 which was listed as for “Grippe”, eight days sick leave, by Dr. Esch (this is actually the incident mentioned in JA 36, where Officer Cassidy testified “This one here is 1/18/62. I went up there at that time for my neck and after I think two days, I went back and it was down in my back and I was crippled up. *I couldn’t straighten out*. That time I believe he sent me for X-rays.” Then Mr. Margolius stated “it shows on the sick card as Grippe”. This incident was also discussed at the February 28, 1963 Retirement Board hearing where Dr. Shapiro’s report states, “His surgical file shows he was seen by Dr. Harrell on January 1962 with a history of being off nine days in July, 1961 for lumbar strain under Dr. Esch ‘Present episode started at home 1/16/62 so acute he couldn’t stand. *Today, can’t straighten*. No radiation points to C4 – no tenderness. No radiation. Lists to right but can’t bend left. Bends forward with acute distress. . . .’”

Officer Cassidy sustained injuries on *November 16, 1960* while on duty at the dog training center when he *was running a dog for an attack and slipped and fell on the gravel surface causing lacerations* (JA 16). He testified at the Retirement Board hearing (JA 31) that his *back* bothered him as a result of this incident and that he so *informed Dr. Harrell* at the clinic.

Officer Cassidy was also involved in another incident in the *summer of 1962* in the 300 block of E Street, S.W., when he arrested a

man for being drunk and disorderly and the man grabbed him, *pulled his tie off and threw him to the ground* (JA 56).

(Officer Received "Outside" Medical Care Under Section 4-525). Cassidy received "outside medical care" as a result of his injuries and the Board of Surgeons' efforts to diagnose his condition, including an X-ray examination of this lumbosacral spine on *January 19, 1962* which showed in part *"There is some straightening of the spinous nodes in the lateral view and there are minimal osteophytes"* (JA 12). He received further X-ray examination of the lumbosacral spine on November 15, 1962 at the Washington Hospital Center (JA 15). He also had certain tests made in connection with possible "rheumatoid disease" which proved to be negative (JA 18-19) and a report of anti-gamma globulin test for rheumatoid arthritis by the Oscar B. Hunter Memorial Laboratory which proved to be negative (JA 19). In addition, the report of Dr. Julius Radice mentioned at JA 72, was an "outside medical examination."

(Officer Ordered before Board of Surgeons and Retirement Board). On November 15, 1962, Dr. Dean, Chairman of the Board of Surgeons, requested the Chief of Police that Officer Cassidy *"be directed to appear before the Board of Police and Fire Surgeons for physical examination in connection with this contemplated retirement"* (JA 20). (All emphasis herein supplied). Officer Cassidy was *ordered to appear* on Tuesday, November 20, 1962, for said examination (JA 21). Later by letter dated *November 28, 1962*, the Retirement Board requested the Chief of Police *"to direct Private Cassidy to appear before the Police and Firemen's Retirement and Relief Board. . . ."* such orders were made (JA 22).

(Dr. Esch Finds Officer Disabled With Diagnosis of "Traumatic Arthritis of the Lumbosacral Region" and Appearance Before

Retirement Board Which Is Concurred in by Board of Surgeons). By letter dated November 20, 1962 (JA 23), Dr. Victor H. Esch, a member of the Board of Police and Fire Surgeons, reported to said Board regarding his care and attendance of Officer Cassidy since November 1960, his injuries in line of duty, his loss of time as a result of these injuries and indicated that *"it will not be possible to rehabilitate Private Cassidy to active police work"*. He recommended appearance before the Retirement Board for consideration of retirement stating *"The diagnosis is traumatic arthritis of the lumbosacral region"*. (JA 23). The Board of Surgeons by a medical survey report of November 20, 1962 concurred in Dr. Esch's recommendations with a finding of *"Arthritis lumbosacral spine"* (JA 24).

(Appellees Granted Appellant "Excess Sick Leave" for the Same Condition Diagnosed by Dr. Esch). By a "Sick Leave Certificate" (JA 25), signed by Dr. Esch, is shown that Officer Cassidy received excess sick leave (more than 30 days in a single year) in both 1962 and 1963. A Metropolitan Police Department "Report on Excess Sick Leave" dated March 6, 1963 shows that Officer Cassidy received 44 days excess sick leave during 1962, 34 which were for "arthritis," 10 of which were listed for rheumatoid arthritis, 8 of which were listed for "reheumatoid disease of Lumbo Sacral region" (JA 26). These are the same conditions diagnosed by Dr. Esch and for which he recommended retirement. This exhibit is stamped "Approved by Commissioners of the District of Columbia Sitting as a Board March 19, 1963". A Metropolitan Police Department "Report on Excess Sick Leave" dated March 6, 1963, shows that Officer Cassidy received 12 days excess sick leave for "arthritis" (JA 27) (apparently for period between 1/1-3/6/63) which is stamped "Approved by the Commissioners of the District of Columbia sitting as a Board March 19, 1963".

(Retirement Board Hearings 1/24/63 and 2/28/63 Result in Split Vote). The 33 page transcript of proceedings before the Re-

tirement Board on January 24, 1963 considering Officer Cassidy's retirement appear as JA 28-65.

(It is suggested that there are some *errors* in the transcription of the recording made of this hearing most of which are apparent, some of which are as follows: JA 37, "7 or 8 days" should probably be "78" days; JA 26 shows that Officer Cassidy has 74 days sick leave during 1962, apparently, as of November 1962; JA 38, "1958" should probably be some other date; JA 39 "January 14, 1962" should probably be "January 14, 1952" – this was the incident when Officer Cassidy fractured his hand as shown at JA 39-40 and is the same incident mentioned on appellant's master sick leave card JA 14, the entry for 1/16/52 showing a "fracture of fifth metacarpal right hand, and is the same incident referred to on JA 69 near the bottom where Dr. Shapiro states "a review of his master sick card shows he lost nine days in January 1952 for fracture of the fifth metacarpal right hand". (JA 43) "August 20, 1960 should be "August 20, 1961" as JA 17 shows that appellant was "detailed to the Canine Corps from the 4th Precinct)".

Some of the important portions of this particular hearing are as follows: Dr. Esch's report JA 29 where he referred to the results of X-rays taken January 19, 1962 and November 15, 1962; he stated that Officer Cassidy was "worked up for *rheumatoid* arthritis and the tests for *rheumatoid* arthritis were negative also tests for gout were negative two out of three times"; it was noted that the Officer's entire personal and medical files were before the Board (JA 30).

(JA 30) The November 16, 1960 accident and incidental were discussed and appellant stated his back was hurt and told the doctor about it.

(JA 32) The *July 15, 1961* accident and incidental when Cassidy jumped a fence with a dog while on duty, is discussed, Officer Cassidy mentioned he had no severe back trouble before the November 1960 accident.

(JA 33) The 1958 *lumbosacral strain* incident was discussed.

(JA 34) The Officer testified that he *didn't hurt his back on outside duty or outside athletic activities*;

(JA 36) The Officer stated that his back trouble was more severe since the 1961 incident.

(JA 36) The Officer referred to his present symptoms and the *January 18, 1962* incident when he couldn't straighten up and was sent for X-rays which appears on his master sick leave card (JA 15) to as Grippe;

(JA 52) The Officer indicated there were *many occasions when he wrestled with prisoners sometimes falling to the ground for which he did not go to the clinic*;

(JA 53) He stated that he cracked a rib in June of 1953;

(JA 55) He testified that he hurt his back only three times i.e. in 1958, 1960 and 1961; he discussed the *summer 1962* scuffle with the drunk when he was thrown to the ground;

(JA 58) He discussed difficulties in restricting dogs in the Canine Corps and the fact that he had been *knocked down by dogs on a number of occasions when he reported nothing*; and that in the Canine Corps they are constantly running and jumping;

(JA 60) That his dog (Wolf) was involved in a number of fights with other dogs;

(JA 61-62) He stated his main trouble was back pain which crippled him at times and fatigue.

(JA 63) Dr. Mensh testified that a *negative X-ray doesn't militate against lumbosacral strain and is not X-ray evidence of the amount of pain*;

(JA 64) Officer Cassidy discussed again one of his severest attacks which occurred in *January 1962* when Dr. Bailey came to his

house when he couldn't straighten up or get out of bed and it was pointed out that this entry appeared as "Grippe" on the master sick card, the entry for 1/16/62;

(JA 64-65) Dr. Mensch testified to the difficulty in keeping records at the clinic because of the tremendous amount of work involved; the Chairman announced that the *case was being referred back to the Board of Surgeons* for further medical examinations and that the case would be reconsidered when these examinations had been completed.

On *February 28, 1963*, the Retirement Board met again to reconsider Officer Cassidy's case and the transcript of this hearing which consists of 15 pages is JA 65-86.

(It is believed as indicated above that there are some errors in this transcript among which are JA 67, where Dr. Shapiro was quoted "I first examined Private Cassidy on January 31, 1962," the date should be *January 31, 1963*. At JA 71, the second line should probably be "*February 7, 1963*" rather than "*January 7, 1963*." This is because apparently Dr. Shapiro did not examine Officer Cassidy at any time prior to the first Retirement Board hearing on January 24, 1963).

Some of the pertinent portions of this second hearing are set forth as follows:

(JA 67) Dr. Shapiro's report of his neurologic and psychiatric evaluation (note correction of date of first examination to January 31, 1963 mentioned above).

(JA 70) Dr. Shapiro's report indicated that the clinic surgical files showed that *Dr. Harrell of the clinic had seen Officer Cassidy on January 1962 and that the "present episode stated at home 1/16/62 so acute he couldn't stand. Today he can't straighten";* he also testified "reading from Clinic Records" that on *June 15, 1962* the man had acute neck pain and couldn't bend forward and that

the *pain was down across the lumbar area and that he developed an exacerbation of the lumbar pain and stiffening of the neck on September 21, 1962 (JA 70).*

The X-rays of appellant's lumbosacral spine of January 19, 1962 showed "*some straightening of the spinous nodes in the lateral view and there were minimal osteophytes on the anterior margins of the bodies of the vertebrae. (objective evidence).*" (JA 71)

(JA 71) Dr. Shapiro noted that Officer Cassidy told him on January 7, 1963 (believed to be February 7, 1963) that he had a "*numb sort of pain at the tip of his tailbone when he does any considerable lifting or walking . . . the pain goes on across my lower back and I can't get cocked over to the right*". (JA 71). Dr. Shapiro stated his "*diagnosis; no evidence of neurologic or psychiatric disease*". (JA 72).

(JA 73) Dr. Julius Radice's report indicated in part that "on physical examination on standing there was a little *dorsal kyphosis. Some straightening of the lumbar spine was noted. Slight paravertebral muscle tightness was present. . .*" (These are *objective* findings of injury to the back).

(JA 73-74) *Dr. Mensh testified that a person can have subjective pain without objective evidence to support it;*

(JA 74) Dr. Mensh indicates that Dr. Shapiro's and Dr. Radice's reports are not inconsistent with the findings in Dr. Esch's report.

(JA 76) It was brought out that the officer was appearing before the Retirement Board as a result of the Board of Surgeons having sent him there; Dr. Mensh testified in substance that the *diagnosis of traumatic arthritis indicates that it was a result of trauma of an injury* (JA 76): Dr. Mensch testified that the tests indicated that there was no basis for a finding of rheumatoid arthritis (JA 76); *Dr. Mensh stated that different doctors use different terms and*

that there was no evidence that the man had rheumatoid arthritis according to the reports that he had read (JA 76): it was brought out that Officer Cassidy had not worked since November (1962) (JA 77)

(JA 78) The Board of Surgeons voted unanimously that this man should appear before the Retirement Board; Dr. Mensh testified that it was significant to the Board of Surgeons that the man had *no symptoms before November 1960 (when he was injured training a dog) and he had had symptoms since then; Dr. Mensh testified in substance that if the man had such a condition it would be aggravated by police duty (JA 79-80).*

(JA 81) Dr. Mensh *refused to agree that the man had no objective findings and said that the X-rays show he did;*

(JA 82) The officer testified that "all I want to do is get better".

After the hearing, four members of the Board of Surgeons voted to retire appellant for disability not incurred or aggravated by the performance of duty but *Dr. Arthur E. Cliff*, the medical member of the Board, the Chief, Health and Examining Service D.C. dissented stating that if a light duty status for a trial period was not available then the retirement should be "*for disability incurred as a result of duty*" (JA 87).

Thereafter, by Retirement Board Order dated March 11, 1963, (JA 88) Officer Cassidy was ordered retired for disability not incurred or aggravated by the performance of duty effective from and after February 28, 1963.

(Commissioners Affirm Retirement Board) Thereafter the Commissioners on February 12, 1964 heard the appeal of Officer Cassidy and voted to affirm the Retirement Board and so notified Officer Cassidy's counsel by letter dated February 26, 1964 (JA 89).

(*Suit Filed, Appellee's Motion for Summary Judgment Granted, and Appeal Noted.*) Thereafter, appellant filed suit against the Board of Commissioners seeking in effect a mandatory injunction requiring appellees to set aside their action sustaining the Retirement Board, etc. (JA 2). Thereafter, each side filed its motion for summary judgment accompanied by pertinent exhibits. On October 18, 1961, Judge John J. Sirica's order granting appellee's motion for summary judgment and denying appellant's motion for summary judgment was filed. Thereafter, appellant filed his notice of appeal on October 26, 1967. (JA 91)

STATUTES AND REGULATIONS

1. The pertinent provisions of the District of Columbia Code, 1961 Edition, namely, Sections 4-521 (in part), 4-525, 4-526, 4-527, and 4-529 are set forth below:

§ 4-521. Definitions.

Wherever used in sections 4-521 to 4-535 –

* * *

(2) The *terms* "disabled" and "*disability*" mean disabled for useful and efficient service in the grade or class of position last occupied by the member by reason of disease or injury, not due to vicious habits or intemperance *as determined by the Board of Police and Fire Surgeons*, or willful misconduct on his part as determined by the Commissioners.

* * *

§ 4-525. Medical and hospital service – Payment of by District on Certificate of Commissioners.

Whenever any member shall become temporarily disabled by injury received or disease contracted in the performance of duty, to

such an extent as to require medical or surgical services, other than such can be rendered by the Commissioners, or to require hospital treatment, the expense of such medical or surgical services, or hospital treatment, shall be paid by the District of Columbia, but no such expense shall be paid except upon a certificate of the Commissioners setting forth the necessity for such services or treatment and the nature of the injury or disease which rendered the same necessary.

§ 4-526. Retirement for disability not incurred in performance of duty.

Whenever any member coming under sections 4-521 to 4-535 completes five years of police or fire service and is found by the Commissioners to have become disabled due to injury received or disease contracted other than in the performance of duty, which disability precludes further service with his department, such member shall be retired on an annuity computed at the rate of 2 per centum of his basic salary at the time of retirement for each year or portion thereof of his service: *Provided*, That such annuity shall not exceed 70 per centum of his basic salary at time of retirement: *Provided further*, That the annuity of a member retiring under this section shall be at least 40 per centum of his basic salary at time of retirement.

§ 4-527. Retirement for Disability while performing or not performing duty.

(1) Whenever any member is injured or contracts a disease in the performance of duty or such injury or disease is aggravated by such duty at any time after appointment and such injury or disease or aggravation permanently disables him for the performance of duty, he shall upon retirement for such disability, receive an annuity computed at the rate of 2 per centum of his basic salary at the time of retirement for each year or portion thereof of his service: *Provided*,

That such annuity shall not exceed 70 per centum of his basic salary at the time of retirement, nor shall it be less than 66-2/3 per centum of his basic salary at the time of retirement.

(2) In any case in which the proximate cause of an injury incurred or disease contracted by a member is doubtful, or is shown to be other than the performance of duty, and such injury or disease is shown to have been aggravated by the performance of duty to such an extent that the member is permanently disabled for the performance of duty, such disability shall be construed to have been incurred in the performance of duty. The member shall, upon retirement for such disability, receive an annuity computed at the rate of 2 per centum of his basic salary at the time of his retirement for each year or portion thereof of his service: *Provided*, That such annuity shall not exceed 70 per centum of his basic salary at the time of retirement, nor shall it be less than 66-2/3 per centum of his basic salary at the time of retirement.

§ 4-529. Involuntary separation from service.

If any member is injured or contracts a disease during his first five years of service in his department which, *in the judgment of the Board of Police and Fire Surgeons*, disables him from performing further duty in his department, and if the Police and Firemen's Retiring and Relief Board finds that such injury or disease *was not* incurred in the performance of duty in his department, such member shall, upon the approval of such finding by the head of his department, and without regard for the provisions of any other law or regulation, be separated from the service.

2. Amended Reorganization Orders 31 and 47.

Reorganization Order No. 31. — Police and Firemen's Retirement and Relief Board

Reorg. Ord. No. 31, C. O. 274,993, C. O. 302,853/14, C. O. 302,970.C, P.D. 01.9542, Apr. 30, 1953, as amended July 20, 1954, June 28, 1955, Sept. 5, 1957, Nov. 22, 1960, and June 21, 1962, ordered that:

* * *

Part IX

* * *

In making such findings of fact the Board shall consider the written opinion submitted to it by the Board of Police and Fire Surgeons concerning the physical or mental condition, or both, of the member for whom involuntary separation or retirement is sought, together with all records and testimony of the Board of Police and Fire Surgeons relating to such member, and such records and testimony of any other person bearing on the matter before the Police and Firemen's Retirement and Relief Board.

The authority set forth in subsection "(1)" of the Policemen and Firemen's Retirement and Disability Act (P.L. 85-157; sec. 4-529, D.C. Code, 1961 ed.) to express a judgment as to the disability of a member from performing further duty in his department is hereby delegated exclusively to the Police and Firemen's Retirement and Relief Board.

Reorganization Order No. 47. — Board of Police and Fire Surgeons

Reorg. Ord. No. 47, L.S. 4237-B. June 26, 1953, as amended Oct. 18, 1958, and June 21, 1962, ordered that

Part I

Board of Police and Fire Surgeons. — A. The existing Board of Police and Fire Surgeons including the Office of the Chairman

thereof, is hereby reconstituted with the same name and with the same functions now performed, including the powers, duties, and authorities of all members, officers, and employees assigned thereto: *Provided*, That in all cases involving retirement or involuntary separation from service pursuant to the Policemen and Firemen's Retirement and Disability Act (P.D. 85-157; sec. 4-526 through 4-529 D.C. Code, 1961 edition (subsection (f). Retirement for Disability Not Incurred in Line of Duty; subsection (g), Retirement for Disability Incurred While Performing Duty; subsection (h). Optional Retirement and subsection (1), Involuntary Separation)), the

duty of the Board of Police and Fire Surgeons shall be limited to that of submitting in writing to the Police and Firemen's Retirement and Relief Board its opinion concerning the physical or mental condition, or both, of the member for whom involuntary separation or retirement is sought, but any member of the Board of Police and Fire Surgeons, and any other person, whose report of the facts or examination of the member formed any part of the basis of such opinion of the Board of Police and Fire Surgeons shall, when so requested by any member of the Police and Firemen's Retirement and Relief Board, testify thereon before the Retirement and Relief Board with respect thereto and produce before such Board all the records and evidence before, or in the files of, the Board of Police and Fire Surgeons or any such other person concerning the member whose retirement or separation is sought, and such submission and all such records and evidence of the Board of Police and Fire Surgeons and of any such other person shall be considered by the Police and Firemen's Retirement and Relief Board: *Provided further*, That under

the authority vested in the Commissioners by Reorganization Plan No. 5 of 1952, as confirmed by the second sentence of subsection "(q)" of the Policemen and Firemen's Retirement and Disability Act, the authority lodged in the Board of Police and Fire Surgeons by subsection "(i)" of said Act and by virtue of Reorganization Order No. 47 prior to this amendment, to express a judgment as to the disability of a member from performing further duty in his department, is hereby withdrawn from said Board of Police and Fire Surgeons, and such authority is hereby delegated exclusively to the Police and Firemen's Retirement and Relief Board, established pursuant to Reorganization Order No. 31, as amended.

* * *

3. Chapter XXXVIV, Section 9, of the *Police Manual* containing the rules and regulations for the government of the Police Department promulgated by the Commissioners under the authority of Section 1 of the Act of February 28, 1901, 31 Stat. 819, as amended by the Act of June 8, 1906, 34 Stat. 221 D.C. Code (1929) Title 20, Section 472, provides:

Sec. 9. The board of surgeons, acting as such board, or members thereof in their individual capacity as such members, shall determine and shall be the only judges as to what amount of sick leave, if any, shall be granted any member of the force: *Provided, however, That in no case will sick time be allowed any member of the force in excess of 30 days, in any one calendar year, except when the same is in direct consequence of injury received (or disease contracted) in the actual performance of duty, or in case of a contagious disease where quarantine becomes necessary, and then only after the surgeon or surgeons*

have stated the cause of such absence, certified to its legality, recommended its allowance, and the *same has been approved by the Commissioners*. (Emphasis supplied)

STATEMENT OF POINTS

It was error for the District Court to grant appellees cross-motion for summary judgment and to deny appellant's motion for summary judgment, because:

I. Appellees' action in granting appellant excessive sick leave, etc. was an acknowledgment that appellants' condition was contracted in line of duty.

II. The Retirement Board and appellees ignored the evidence and improperly retired appellant for disability not incurred in line of duty rather than for disability incurred (or aggravated) in line of duty.

III. Under the liberal attitude of this Court in retirement cases and the case of *Blohm v. Tobriner*, the appellee's have the burden of establishing that appellant's disability (which it is agreed exists) did not result from performance of duty (or aggravation by Duty), which they have failed to do.

SUMMARY OF ARGUMENT

Officer Cassidy sustained many injuries on duty most to his back, in making arrests and in his strenuous work with Canines including "L.S. Strain" - 1958, an injury on November 16, 1960, another on July 18, 1961 and in the summer of 1962, he was ordered before the Board of Surgeons who recommended him for "Retirement-Disability" "Arthritis lumbo-sacral spine". Appellees recognized that his injuries were incurred in line of duty by granting him large amounts of "excess sick leave" and providing "out-

side" medical care which would be improper unless connected with duty and there were objective evidence of back injury as shown by X-rays and Dr. Radice's report. He was ordered before the Retirement Board and the medical member of the Retirement Board voted for "disability incurred as a result of duty". Despite appellees' 'Amended Reorganization Orders 31 and 47, which prohibited the Surgeons from "expressing a judgment as to disability", the opinions of the Board of Surgeons members that appellant's disability is related to duty were nevertheless clear at the Retirement Board hearing.

On the basis of the legal authorities, including the *Blohm* case which places a *substantial burden* on the Commissioners, which has not been borne here, the decree against resolving "*doubts*" against policemen in retirement cases, the liberal attitude of this Court toward retirement cases of this kind generally, as evidenced by the *Hyde* case which requires that the "*evidence must be viewed in a light more favorable to the applicant seeking relief than in the usual type of civil action*", and upon the "humane aspects of the retirement laws" as referred to in the *Crawford* case, appellant's motion for summary judgment should have been granted and appellees' motion for summary judgment should have been denied.

ARGUMENT

I

**Appellees' Action in Granting Appellant Excessive Sick
Leave, Etc. Was an Acknowledgment That Appellants'
Condition Was Contracted in Line of Duty**

Appellant's Exhibits 6A, B, & C (JA 25-27) show that plaintiff was granted sick leave in *excess of 30 days*, which is more than was permitted under Chapter XXXIV of the Police Manual, hereinbefore set forth. This was *approved* by the *Board of Surgeons*, the *Chief of Police*, and the *Commissioners*. This would be *improper* in the absence of a determination that plaintiff's condition was incurred in performance of duty.

It is submitted that this was a definite acknowledgement that Plaintiff's condition resulted from or was aggravated by performance of duty, and such action is entirely *inconsistent* with the Retirement Board's decision (and Commissioner's affirmance) finding that plaintiff's condition was not incurred in line of duty.

This Court in the case of *Hyde v. Tobriner*, (an arthritis case), 329 F.2d 879, 117 U.S. App. D.C. 311 (1964), recognized the significance of granting excess sick leave under these circumstances, stating, in part, at page 312, as follows:

"With the approval of the Commissioners, appellant during his tenure, had been given about 150 extra sick leave days with pay, when suffering from arthritis on the basis of the Board's opinion that the disease 'was a direct consequence of injury received (or disease contracted) in actual performance of duty.'"

In the case of *Graham v. Tobriner*, the District Court, in C. A. 1291-62, Judge Tamm, in commenting on this phase of the case, stated in his Memorandum Opinion, dated June 28, 1962, in part as follows:

"In addition to the medical testimony, the records of the police department and the Police Department Clinic disclose that plaintiff's ailment was *consistently recognized* as having been incurred in the line of duty." (emphasis supplied)

In the case of *Carroll v. Tobriner*, 223 F.Supp. 87 (1966), affirmed without opinion by this Court, *Tobriner v. Carroll*, No. 20141, Judge Oliver Gasch, stated in part:

"This Court's evaluation of the record is in line with the previous administrative decision to grant plaintiff sick leave in addition to the usual annual allowance which required a finding that illness or injury, because of which the leave was granted, was related to the line of duty."

The effect of excess sick leave and similar benefits was also recognized in the *Blohm* case (which reversed a District Court decision), where it was stated in part:

"... He was given, accordingly, several days of excess sick leave and his medical bills were paid from public funds — benefits which, in the one case, under statute and, in the other, under police regulations, *were available only in the case of service connected disabilities*." (Emphasis supplied.)

II

The Retirement Board and Appellees Ignored the Evidence and Improperly Retired Appellant for Disability Not Incurred in Line of Duty Rather Than for Disability Incurred (or Aggravated) in Line of Duty.

Retirement of members of the Metropolitan Police Department, etc. is provided for in Title 4, D. C. Code (1951) Ed., Secs. 4-521 through 4-535, cited as the "Policemen and Firemen's Retirement and Disability Act."

The order complained of was issued under Title 4-526, "Retirement for Disability *Not* Incurred in the Performance of Duty." This section required a finding by the Commissioners, appellees herein, that the member has become disabled due to injury received or disease contracted *other* than in performance of duty. The retirement under this section provided for an annuity computed at the rate of 2% of the officer's basic salary at the time of his retirement for each year or portion thereof of his service with a minimum of 40%, which amount is subject to Federal and State income tax.

Plaintiff contends that he should have been retired under Title 4-527, which provides for retirement for *disability incurred while performing duty* (or aggravated by duty). This section, in substance, provides that when a member is injured or contracts a disease in performance of duty and such injury or disease permanently disables him for the performance of duty, he shall receive an annuity of not less than 66-2/3% of his basic salary at the time of his retirement (which is not subject to Federal or State income tax).

It is undisputed that Appellant has been permanently disabled for the performance of his duty, for otherwise he would not have been retired at all. The only question involved is whether the disability arose in line of duty or otherwise.

It is well established that a *trier of facts* by a Judge, jury, or, as in this case, a Retirement Board and defendants, etc., *cannot disregard testimony* which is all one way, not immaterial, etc. Thus, this Court in the case of *Stone v. Stone*, 78 U.S. App. D.C. 5, 8 F.2d 761, stated in part:

"In this case there was positive testimony, uncontradicted and not inherently improbable. Neither a Jury, nor a Judge is at liberty to disregard such evidence. Where the testimony is all one way, and is not immaterial, irrelevant, inconsistent, contradicted or discredited, such testimony cannot be disregarded or ignored by Judge or

Jury, and if one or the other makes a finding which is contrary to such evidence, or which is not supported by it, an error results for which the verdict or decision, if reviewable, must be set aside. To hold otherwise would vest triers of the facts in cases subject to review with authority to disregard the rules of evidence which safeguard the liberty and estate of the citizen."

It is also well established that while appellees have "administrative authority," they cannot act arbitrarily; and their actions in retirement matters are subject to judicial review. See *Spencer v. Bullock*, 94 U.S. App. D.C. 388, 216 F.2d 54, where Judge Fahy in his dissenting opinion stated at page 392, "*The Commissioners may not be arbitrary, however and their action is subject to appropriate judicial review.*" (Emphasis supplied.)

In the case of *Crawford v. McLaughlin, et al.*, 109 U.S. App. D.C. 264, 286 F.2d 821, a retirement case, this Court discussed the "humane purpose of such retirement laws" and stated in pertinent part:

"We find no evidence that the disabling condition grew out of any injury received or disease contracted other than in the performance of duty. In the face of the evidence to which we have referred, tracing the condition to an injury received in the performance of duty, it would be too speculative to infer that the condition which had manifested itself prior to the carpentry and other extra work was due to that work." (Emphasis supplied).

"Since the evidence supports only a conclusion attributing the disability to injury received in the performance of duty, plaintiff is entitled to be retired under Section 4-527. The writ sought should accordingly be issued. We are fortified in this conclusion by consideration of the humane purpose of such retirement laws. See *Bradley v. City of Los Angeles*, 55 Cal. App.2d 592, 131 F.2d

391 (1942). This purpose would partially fail of accomplishment were the evidence in this record held to be insufficient to support retirement under Section 4-527."

On the degree of medical certainty required as to the causal connection, see the FELA case of *Sentilles v. Inter-Caribbean Shipping Corp.*, 80 S. Ct. 173, 4 L.ed 2d 142 (1959), reversing 256 F.2d 156 (5th Cir. (Fla) 1958), wherein it was held that medical testimony that a trauma "might or could have aggravated tuberculosis" was sufficient proof of medical causation. (emphasis supplied).

Thus, even if Appellant had the burden of connecting his disability with his police duties, which is not the law, as hereinafter shown, it is submitted that he has successfully borne such burden; and he should under the "humane purpose of such retirement laws, he retired for disability incurred in line of duty with its attendant advantages.

III

Under the Liberal Attitude of This Court in Retirement Cases and the Case of *Blohm v. Tobriner*, the Appellees Have the Burden of Establishing That Appellant's Disability (Which It Is Agreed Exists) Did Not Result From Performance of Duty (or Aggravation by Duty), Which They Have Failed To Do.

Appellant here did not seek to be retired from the Police Department and is not the moving party. He was "directed" to appear before the Board of Surgeons and Retirement Board.

The important case of *Blohm v. Tobriner*, 122 U.S. App. D.C. 2 (1965), rehearing denied, reads in part:

"Where it is the police department which initiates the proceeding to retire an officer against his will for a disability which is alleged to be unrelated to his offi-

cial service, *the evidence of such lack of connection should clearly preponderate and be substantial and persuasive.* Absent a record of which this can be said the Department may be said to have failed to carry the burden, fairly to be assigned to it under the statute." (Emphasis supplied).

In Footnote No. 2, the Court stated, in part:

"*The Department has the burden of showing affirmatively that appellant's headaches were not the result of his earlier accident. When its own evidence, in substance, merely demonstrates the difficulty of establishing the contrary, we cannot say that the burden has been met.*" (Emphasis supplied.)

Further, it is stated (122 U.S. App. D.C. at 3) in part as follows:

"As appellant's history shows, policemen must of necessity engage in hazardous work as part of their regular duties and Congress has amply manifested a distaste for the resolution of *doubts* against them in the administration of the laws passed for their protection. See *Hyde v. Tobriner, supra*, Note 1." (And citing other cases) (Underlining supplied).

The *Blohm* case, while not actually so holding, in effect, results in the *presumption* arising similar to that in the Workmen's Compensation Act, 33 U.S.C. 920, which states in part:

"In any proceeding for the enforcement of a claim for compensation under this Chapter it shall be presumed *in the absence of substantial evidence to the contrary* — (1) That the claim comes within the provisions of this Chapter. . . ."

The liberality of the Court of Appeals toward retirement cases is further shown in the case of *Hyde v. Tobriner*, 117 U.S. App. D.C. 312, where it is stated in part as follows:

"The *ambiguity* in this statement (referring to the doctor's statement that the officer's arthritis was either caused by or aggravated by his duties) is resolved favorably to the appellant because the Board of which this doctor was a member had previously certified that appellant's injury or disease, arthritis, was incurred in the performance of duty, adding that police officers are generally susceptible to this illness due to the nature of dampness, cold and strenuous nature of their duties. In evaluating the evidence consideration was given to the *humane purpose of such retirement laws*. *Accordingly, the evidence must be viewed in a light more favorable to the applicant seeking relief than in the usual type of civil action.* See *Crawford v. McLaughlin*. . . ."

It is submitted that the reason why the Board of Surgeons members (Dr. Mensh and Dr. Shapiro) testifying before the Retirement Board failed to render an express opinion as to the *causal connection* between plaintiff's *performance of duty* and the condition diagnosed by the member of the Board of Surgeons attending the plaintiff, was because of the Defendants' *Amended Reorganization Orders* 31 and 47 (See statutes and Regulations) dated June 21, 1962, which orders purported to *withdraw* from the Board of Surgeons the function of expressing a judgment as to the disability of a member, (which as shown by D.C. Code 4-521(2) and 4-529 were delegated to the said Board of Surgeons by Congress) and to re-delegate this function to the Retirement Board. It is urged that these reorganization orders are *invalid* as an attempt by the Commissioners to change the provisions of an Act of Congress. If such a rule was effective in civil negligence cases, a plaintiff would never be able to establish through a medical expert a *prima facie* case sufficient to present a jury question on causal relationship between an accident and the plaintiff's diagnosed condition. The effect of this "gag" should be considered by the Court favorably to the plaintiff. It is further urged that in the absence of medical opinion that the officer's con-

dition was *not* incurred or aggravated by duty that defendants have *not borne their burden* under the *Blohm* case.

Thus, the evidence in this case falls far short of the requirement of the *Blohm* case, and that plaintiff should be retired for disability incurred or aggravated by performance of duty.

In recognition of the *Blohm* case the District Court has held that the usual presumption in favor of sustaining findings of administrative bodies is not to be indulged in a case where a District of Columbia policeman is retired for disability not incurred in line of duty. *Monica v. Tobriner*, D.C., (1966), 253 F. Supp. 851.

CONCLUSION

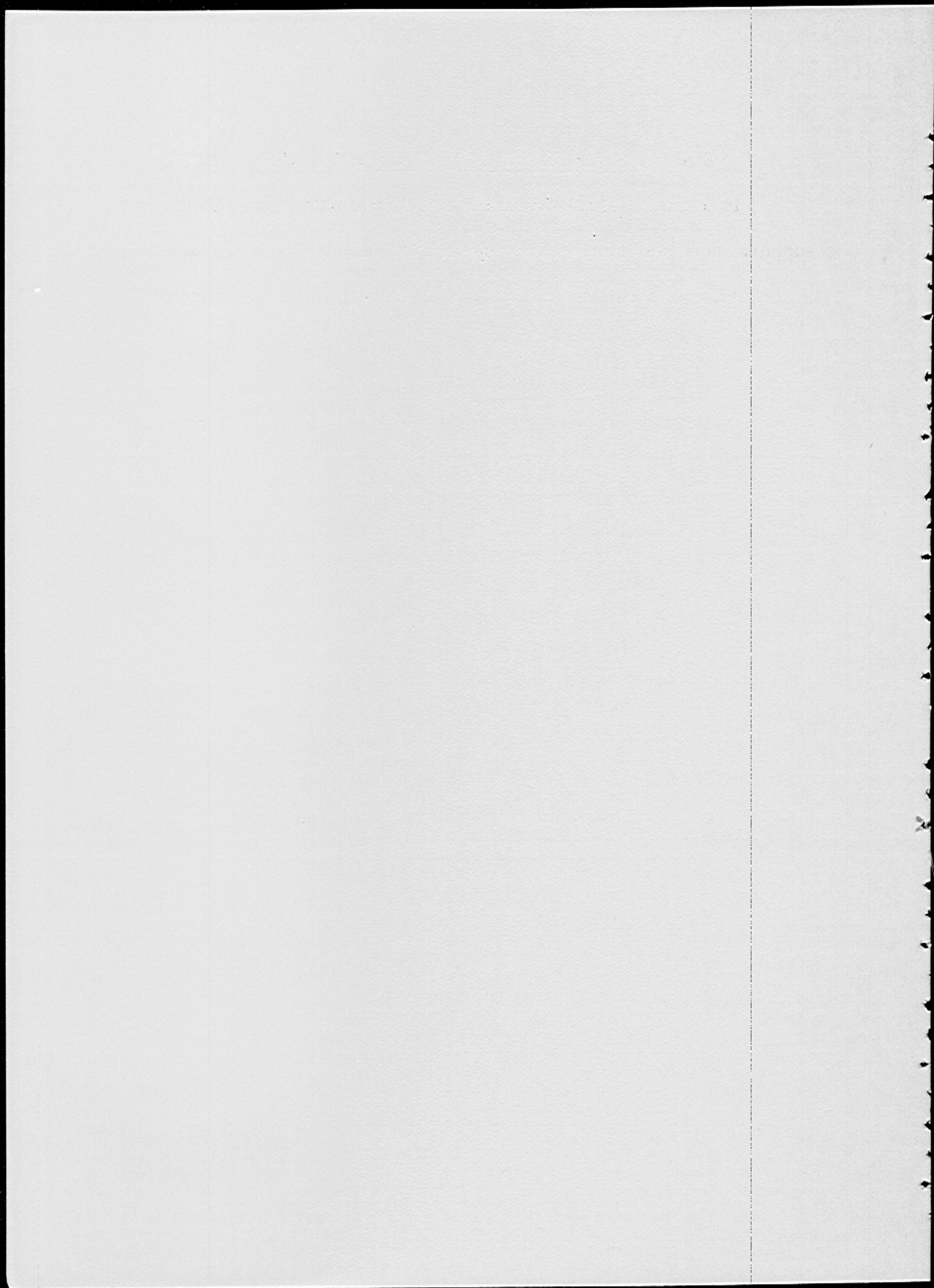
On the basis of the foregoing authorities, including the *Blohm* case which places a substantial burden on the Commissioners, which has not been borne here, and the decree against resolving "*doubts*" against policemen in retirement cases, and the liberal attitude of this Court toward retirement cases generally, as shown by the *Hyde* case which requires that the "*evidence must be viewed in a light more favorable to the applicant seeking relief than in the usual type of civil action,*" and upon the "humane purpose of the retirement laws" as referred to in the *Crawford* case, the case should be reversed and appellant ordered retired for disability incurred in the performance of, or aggravated by duty.

Respectfully submitted,

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BRIEF FOR APPELLEES

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 21,485

JAMES J. CASSIDY,

Appellant,

v.

WALTER N. TOBRINER, et al.,

Appellees.

Appeal From The United States District Court
For The District Of Columbia

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United States Court of Appeals
for the District of Columbia Circuit

FILED MAR 14 1968

Nathan J. Paulson



COUNTERSTATEMENT OF QUESTION PRESENTED

Is there in the administrative record substantial evidence to support appellees' finding that appellant's disability was not incurred in the performance of his duties as a Metropolitan Police officer?



I N D E X

Page

SUBJECT INDEX

Counterstatement of Question Presented.....	i
Counterstatement of the Case.....	1
Summary of Argument.....	8
Argument	
I <u>There is substantial evidence in the record to</u> <u>support the administrative determination</u> <u>that appellant's disability was not incurred</u> <u>in the performance of his duties as a police</u> <u>officer.....</u>	8
<u>Medical evidence of disability.....</u>	12
<u>Appellant's claim of disability.....</u>	16
II <u>That appellant was granted extra days of sick</u> <u>leave, upon certification that his disability</u> <u>was duty connected, is not sufficiently</u> <u>probative to overcome the earlier finding</u> <u>of the Retirement Board that the disability</u> <u>was not duty connected.....</u>	20
Conclusion.....	21

CASES CITED

<u>Horrigan v. Tobriner, et al.,</u> U. S. App. No. 19,844 (decided March 23, 1966).....	21
<u>King v. Tobriner, et al.,</u> U. S. App. No. 19,843 (decided March 23, 1966).....	21

<u>Sentilles v. Inter-Caribbean Shipping Corp.</u> (1959), 361 U. S. 107.....	10
--	----

DISTRICT OF COLUMBIA CODE, 1967, CITED

Title 1, Reorganization Order No. 31, Part III.....	21
Section 4-526.....	2
Section 4-527.....	2

OTHER AUTHORITY CITED

<u>Report of the President's Commission on Crime in the District of Columbia</u> (1966), Appendix, page 143.....	9
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UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 21,485

JAMES J. CASSIDY,

Appellant,

v.

WALTER N. TOBRINER, et al.,

Appellees.

Appeal From the United States District Court
For The District Of Columbia

COUNTERSTATEMENT OF THE CASE

By a complaint filed April 16, 1964, in the United States District Court, appellant sought a mandatory injunction to compel appellees, who formerly constituted the Board of Commissioners of the District of Columbia (hereinafter referred to as the Commissioners), to set aside their order affirming the order of the Police and Firemen's Retirement and Relief Board (hereinafter referred to as the Retirement Board), retiring appellant from the Metropolitan Police Department of the District of Columbia for disability not incurred in the per-

formance of his official duties;¹ and, further, to order that he be retired for disability incurred in, or aggravated by, the performance of duty² (J. A. 2-5).

Appellant filed a motion for summary judgment and incorporated therein by reference the entire administrative record (J. A. 8-89). Appellees filed a cross motion for summary judgment (J. A. 90).

Upon consideration of the motion and cross motion for summary judgment, the District Court, on October 18, 1967, denied appellant's motion for summary judgment and granted appellees' cross motion (J. A. 91).

From the administrative record it appears that appellant, on May 1, 1951, at the age of twenty-nine, was appointed to the Metropolitan Police Department (J. A. 28). On April 4, 1958, as a consequence of a fall during performance of police duty, appellant suffered a lumbo-sacral strain and was placed on sick leave for three days (J. A. 14, 33-34).

¹ See D. C. Code, § 4-526 (1967), which provides, now as then, for pension benefits between 40 and 70 percent of the officer's basic salary at the time of retirement.

² See D. C. Code, § 4-527 (1967), which provides, now as then, for pension benefits between 66 2/3 and 70 percent of the officer's basic salary at the time of retirement.

On November 16, 1960, while a member of the Canine Corps engaged in a dog training exercise, appellant slipped and fell on a gravel surface, suffering lacerations to his face, left hand, and left knee (J. A. 16, 30). Two days after this injury appellant was, on November 18, 1960, examined at the Police Clinic by Dr. Weller, who determined that no treatment was necessary (J. A. 16, 30).

While investigating a robbery on July 15, 1961, appellant jumped a three-foot fence and fell, injuring his back (J. A. 17, 32, 51). His injury was diagnosed at the time as lumbo-sacral strain, and appellant remained off duty for four days (J. A. 15).

Just prior to his fortieth birthday in March 1962, appellant was given a routine police department physical examination. The results of the examination were favorable and in no way indicative of the disability which he now claims. (J. A. 42.)

Beginning in June 1962, just three months after having completed the department physical examination, appellant frequently remained away from work, taking substantial amounts of sick leave, as follows:

<u>"Date Sick</u>	<u>Days</u>	<u>Diagnosis</u>
1-16-62	8	Grippe
6-9-62	8	Rheumatoid disease of Lumbo Sacral region
7-14-62	5	Grippe

8-24-62	10	Rheumatoid arthritis
9-21-62	5	Observation
10-20-62	4	Grippe
11-13-62	34	Arthritis" (J. A. 26.)

Appellant commenced to complain of "recurrent low back pain, which he state[d] prevents him from performing his duties as a Police Officer" and of pain in his "left knee" (J. A. 23). Although he had been under the care of Dr. Esch of the Board of Police and Fire Surgeons, appellant did not respond favorably to treatment (J. A. 29). Consequently, he was given a clinical examination at the Hunter Memorial Laboratory early in September 1962 and, later in the month, at the Fire and Police Department Clinic, for rheumatoid arthritis; the results of both tests were negative (J. A. 19).

In November 1962, appellant was given a third clinical examination at the Washington Hospital Center, and the finding was as follows:

"Examination of the lumbo-sacral spine shows no fracture or dislocation. The intervertebral disc spaces and articular facets are preserved. There are minimal osteophytic changes of the lumbar spine. Both sacro-iliac joints appear normal.

"Examination of the left knee shows no abnormalities of the bones or joints." (J. A. 18.)

Thereafter, on November 20, 1962, because appellant still had not responded to treatment, Dr. Esch made the following recommendation to the Board of Police and Fire Surgeons:

"It is my opinion that it will not be possible to rehabilitate Private Cassidy to active Police work. It is therefore recommended that he appear before the Retirement and Relief Board for consideration of retirement.

"The diagnosis is traumatic arthritis of the lumbosacral region." (J. A. 23.)

Appellant thereafter appeared before the Board and claimed inability to perform police duty on the grounds that he suffered fatigue, back pain, shoulder pain, neck pain, pain in both knees, and tired legs (J. A. 37). He attributed his condition to a series of mishaps which he experienced during the performance of police duty. He referred specifically to a fall which he suffered on April 4, 1958 (J. A. 33, 36); to a fall which occurred while he was engaged, on November 16, 1960, in a dog training exercise (J. A. 29-30); and to a fall which occurred on July 15, 1961, while he was pursuing a robbery suspect (J. A. 32).

In response to queries by the Retirement Board, appellant testified that on January 14, 1962, as he was carrying a foot locker down a flight of stairs in his home, he fell and injured himself. When asked whether or not he injured his back at that time, he replied, "no, sir." (J. A. 39.) However, the record indicates that appellant remained away from duty on that occasion eight days, suffering ostensibly from "grippe" (J. A. 15). In explaining to the Retirement Board this absence from duty, appellant said:

Pvt. Cassidy: * * * I went up there * * * [to the Police and Firemen's Clinic] for my neck and after, I think, two days I went back and it was down in my back and I was crippled up and I couldn't straighten out. That time, I believe, [Dr. Esch] * * * sent me for x-rays.

Mr. Margolius [appellant's counsel]: It shows on the sick card as grippe. (J. A. 36.)

Between March and July 1962, appellant performed outside employment which required him to lift and carry electric motors weighing as much as 40 pounds (J. A. 47-49). He admitted to the Retirement Board that, during the summer of 1962, he engaged in such physical recreation as swimming and badminton (J. A. 49).

On January 24, 1963, after having heard the testimony of appellant and Dr. Mensh, a member of the Board of Police and Fire Surgeons (J. A. 28), the Retirement Board, without rendering any decision, remanded the case to the Board of Police and Fire Surgeons so that appellant could be given additional medical examinations--orthopedic, neurological, and psychiatric (J. A. 64-65).

Following remand, the Retirement Board reconvened on February 28, 1963, to hear additional medical evidence respecting appellant's claim of physical disability (J. A. 65). A medical report prepared by Dr. Hyman D. Shapiro, who conducted a comprehensive neurological and psychiatric examination of appellant, was read into evidence (J. A. 67-72). Dr. Shapiro concluded his report by stating: "Diagnosis: No evidence of neurologic or psychiatric disease" (J. A. 72).

A medical report prepared by Dr. Julius J. Radice, an orthopedic physician, was also read into evidence (J. A. 72-73). In his report, Dr. Radice, after examining appellant, concluded:

"The patient [appellant] talked at great length regarding his several episodes of back injury and recurrent attacks of back pain, but the patient's described symptoms of disability certainly do not coincide with the physical findings in my examination, which are essentially negative at this time. The patient is entirely pain free at this time.

"Diagnosis: Mild Arthritic changes."
(J. A. 73.)

Thus, neither Dr. Shapiro nor Dr. Radice found evidence to indicate that appellant was suffering from traumatic arthritis (J. A. 74). Their only finding of any significance was that appellant exhibited "mild arthritic changes" which, as Dr. Mensh testified, "millions of people" manifest without suffering any physical disability whatever

(J. A. 73, 80). In short, the medical reports indicate no "objective evidence" that appellant's disability was incurred in, or aggravated by, the performance of duty (J. A. 74, 79).

SUMMARY OF ARGUMENT

Appellant's disability, diagnosed as it was as "traumatic arthritis of the lumbo-sacral region," was not incurred in, or aggravated by, performance of duty. Moreover, upon further examination, appellant exhibited no symptoms or evidence of traumatic arthritis; there was no evidence of neurological or psychiatric disease; and he was then "pain free."

There was, therefore, substantial evidence in the administrative record to support appellees' determination that appellant's disability was not incurred in the performance of his duties as a police officer.

ARGUMENT

I

There is substantial evidence in the record to support the administrative determination that appellant's disability was not incurred in the performance of his duties as a police officer.

Because of the "exceptionally heavy percentage" of applications for disability retirement by members of the Metropolitan Police Depart-

ment of the District of Columbia,³ an increasing number of cases such

³ In a 1966 survey of the Metropolitan Police Department, conducted by the International Association of Chiefs of Police, the disproportionately high number of disability retirements among officers of the department was officially noted:

"Examination of retirements in 1964 and 1965 shows that an exceptionally heavy percentage is due to disability. Of 87 retirements in the fiscal year 1964, only 15 were granted through conventional service; line-of-duty injuries accounted for 20, line-of-duty aggravations of disability accounted for 29, and 22 were judged to be 'off-duty disability' retirements after consideration by the Board of Commissioners. The situation is even more apparent in the fiscal year of 1965. Of 102 retirements, only 18 (17 percent) were of the nondisability nature; of the balance, 45 percent were considered to be aggravated by performance of duty.

"A substantial percentage of the 87 retirements in 1964 was based on personality or mental disorders. Several command officers expressed concern at this seeming high rate and were of the opinion that the psychiatrist member of the Board of Police and Fire Surgeons recommends such retirement for insufficient cause. The same officers quoted the doctor to the effect that a department is better off with a man who is drawing 40 percent of his pay instead of drawing 100 percent and doing nothing." See: Report of the President's Commission on Crime in The District of Columbia, Appendix, p. 143 (1966).

as the one at bar are being filed in the District Court.⁴ Many will have to be resolved on appeal to this Court.⁵

The function of this Court in reviewing such cases has been well defined by the Supreme Court in Sentilles v. Inter-Caribbean Shipping Corp., 361 U. S. 107, 110 (1959), where it said:

⁴ The following police retirement cases have been disposed of by the District Court since January 1, 1967:

Wyckoff v. Tobriner, et al., C. A. 1154-63
Cassidy v. Tobriner, et al., C. A. 907-64
Bixler v. Tobriner, et al., C. A. 908-64
Levandoski v. Tobriner, et al., C. A. 1504-64
Beltrante v. Tobriner, et al., C. A. 1798-64
Scherer v. Tobriner, et al., C. A. 2852-64
Chapman v. Tobriner, et al., C. A. 1645-65
Cranford v. Tobriner, et al., C. A. 1646-65
Wingo v. Tobriner, et al., C. A. 1975-65
Young v. Tobriner, et al., C. A. 2485-65
Parris v. Tobriner, et al., C. A. 144-66
Roberts v. Tobriner, et al., C. A. 744-66
Thanos v. Tobriner, et al., C. A. 3351-66

⁵ Of the above listed cases, at least six are now pending appeal in this Court:

Wingo v. Tobriner, et al., No. 21,355
Cassidy v. Tobriner, et al., No. 21,485
Young v. Tobriner, et al. (C. A. 2485-65)
 Appeal noted January 29, 1968
Beltrante v. Tobriner, et al. (C. A. 1798-64)
 Appeal noted February 23, 1968
Scherer v. Tobriner, et al. (C. A. 2852-64)
 Appeal noted February 23, 1968
Roberts v. Tobriner, et al. (C. A. 744-66)
 Appeal noted February 23, 1968

" * * * Though this case involves a medical issue, it is no exception to the admonition that, 'It is not the function of the court to search the record for conflicting circumstantial evidence in order to take the case away from the jury [the finder of fact] on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury.... The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable....

Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.' * * * "

[Citations and footnotes omitted.]

As will be shown in the case at bar, there is a yawning disparity between the medical proof and appellant's testimony of physical disability. Vastly contradictory inferences and conclusions can be drawn from this record. For example, from the record it can be reasonably inferred that appellant suffers no disability whatever (J. A. 73, 80) or that he is totally incapacitated for police duty (J. A. 23). It can be inferred that his disability resulted directly from a fall which occurred while he was off-duty (J. A. 36, 39) or from strain resulting from the nature of his duties in private employment (J. A. 48-49). It can be inferred that appellant exaggerated his symptoms (cf. J. A. 55 with 72-73; cf. J. A. 23 with 37, 67, 71), that his complaint of disability is

a complete sham and evidences his purpose to leave the police force because his superior officers refused to authorize a departmental transfer which he requested (J. A. 43-44, 52), or that his disability, while not capable of exact medical diagnosis, is very real and painful (J. A. 79-80).

In short, because of the conflicting inferences and conclusions which can be drawn from the record, the administrative findings and conclusions of the Retirement Board, as affirmed by appellees, should be accorded great weight. It is this body which was most favorably situated to " * * * select from among conflicting inferences and conclusions that which it considers most reasonable." 361 U. S. at page 110. It is this Board which had the opportunity to observe, hear, and cross-examine appellant with respect to his claim of physical disability.

The conflicting evidence respecting appellant's disability presented to the Retirement Board was as follows:

Medical evidence of disability

In March 1962, just prior to his fortieth birthday, appellant underwent a departmental physical examination, and the results, by his own admission, were in no way suggestive of the disability which he later claimed as grounds for his retirement (J. A. 42).

Starting in June 1962, three months after such physical examination, appellant frequently remained away from work, taking substantial

amounts of sick leave, including two periods of eight and ten days for rheumatoid arthritis, two periods of four and five days for grippe, five days for observation, and 76 days for arthritis (J. A. 26-27). Appellant began to complain of "recurrent low back pain, which he state[d] prevents him from performing his duties as a Police Officer" and of pain in his left knee (J. A. 23).

Although the condition which ostensibly caused appellant's absences from work in June and August 1962 was diagnosed, both by Dr. Esch and Dr. Harrell, as "rheumatoid arthritis" (J. A. 15, 70-71), a series of diagnostic tests was later performed which eliminated rheumatoid arthritis as a cause (J. A. 19). These tests also indicated that his lumbo-sacral spine exhibited no evidence of fracture or dislocation (J. A. 18). Nevertheless, because appellant persisted in his complaints of back pain, because he continued to lose time from duty, and because it was the opinion of Dr. Esch that " * * * it will not be possible to rehabilitate Private Cassidy to active Police work," he was recommended for retirement (J. A. 23). The diagnostic basis for disability given at that time by Dr. Esch was "traumatic arthritis of the lumbosacral region" (J. A. 23).

A retirement hearing was held on January 24, 1963, and, because the evidence of disability was inconclusive (J. A. 28, 63-64),

appellant's case was remanded to the Board of Police and Fire Surgeons so that orthopedic, neurological, and psychiatric examinations could be made (J. A. 65).

Thereafter, on February 28, 1963, when the retirement hearing was reconvened, the results of these various examinations were read into evidence (J. A. 65). Dr. Hyman D. Shapiro, after making a thorough and comprehensive neurological and psychiatric examination of appellant (J. A. 67-72), stated, inter alia, in his report, as follows:

"Neurologic Examination: Station and gait, including walking on heels and toes, are normal. I could detect no muscle spasm in his back. Forward bending was not limited but he stated it caused some stiffness in his lower back. He got on and off the examining table without any difficulty. Straight leg raising performed very freely and without any resistance or pain. His knee jerks and ankle jerks were both active and equal. The sensory examination was completely negative. * * *

"Diagnosis: No evidence of neurologic or psychiatric disease." [Emphasis supplied.]
(J. A. 72.)

Dr. Radice, an orthopedic physician (J. A. 72), examined the x-ray reports relative to appellant's spinal condition (J. A. 18-19), and personally made a physical examination of him, finding "mild arth-

ritic changes"⁶ (J. A. 73). He concluded, notwithstanding the "mild arthritic changes," that appellant was not disabled, that he was free of pain, and that he did not exhibit any of the objective physical symptoms of the condition of which he complained. He reported specifically as follows:

"The patient talked at great length regarding his several episodes of back injury and recurrent attacks of back pain, but the patient's described symptoms of disability certainly do not coincide with the physical findings in my examination, which are essentially negative at this time. The patient is entirely pain free at this time." (J. A. 73.)

Thus, the Retirement Board was told that the medical reports indicated no "objective evidence" of the disability of which appellant complains (J. A. 74, 76, 79), nor any evidence of traumatic arthritis (J. A. 74). The only evidence of appellant's disability--that is, his claim that he suffers from fatigue, back pain, shoulder pain, neck pain, pain in both knees, and tired legs--was subjective (J. A. 37).

⁶ Dr. Mensh testified before the Retirement Board that "millions of people," without suffering any physical disability whatever, exhibit similar mild arthritic changes of the spine (J. A. 80).

Appellant's claim of disability

Appellant's claim of disability and his opinion as to its alleged cause is not consistent with the aforementioned medical findings. When appellant appeared before the Retirement Board, he justified his inability to perform duty on the grounds that he suffered from:

Fatigue

"Fatigue and just, for instance, for no rhythm [sic] or reason, I get tired. I have never got tired before. * * * " (J. A. 37.)

Back pain, shoulder pain, neck pain

" * * * I get these pains in the back playing with the children. Anything seems to bother my back. I get up in the morning, I have pains in the shoulders and neck which I never had and when I do a lot of walking, it fatigues me and I have got to sit down. Generally it is a situation that I felt was just local in the back and now it has gotten worse." (J. A. 37.)

Tired legs, pain in both knees

" * * * It's just in my leg if I stand a long period of time but not from my back. It don't seem to go from my back. My legs get tired, but pain doesn't seem to run down the back, just in the knees or something. That is when I say I stand a long time for a short period or something." (J. A. 37.)

At the retirement hearing on January 24, 1963, appellant was asked whether or not he suffered a constant pain in his back, and he re-

plied: "It's just current. It stays with me." (J. A. 55.) One week later, on February 1, 1963, when appellant was examined by Dr. Radice, the latter reported that "the patient is entirely pain free at this time" (J. A. 72-73). Dr. Shapiro, when he examined appellant on or about February 8, 1963, corroborated Dr. Radice's finding that appellant was without pain (J. A. 67, 72). Appellant, after being confronted by these medical reports, conceded, although hesitantly, " * * * at times, that's true, I go without pain * * * . When I went to Dr. Radice, I didn't have any pain. When I went to Dr. Shapiro, I didn't have any pain at that time. * * * " (J. A. 81.)

On November 20, 1962, appellant complained of pain in his "left knee" (J. A. 23). On January 24, 1963, appellant complained of pain in his "knees" (J. A. 37). When, on or about February 8, 1963, appellant was examined by Dr. Shapiro, he made no complaint of pain in either knee. He merely stated to Dr. Shapiro " * * * that outside of his back and neck he has no disability other than his 'nervous stomach' * * * " (J. A. 71).

When Dr. Esch recommended that appellant appear before the Retirement Board, it was based upon appellant's claim that " * * * the onset of his symptoms" was caused by an injury occurring " * * * in the line of duty on November 16, 1960" (J. A. 29). The injury was

alleged to have occurred while appellant was a member of the Canine Corps and engaged in training his dog (J. A. 16, 30). In a written report of the incident, which appellant himself wrote and submitted shortly after the mishap occurred (J. A. 31), he claimed only that " * * * I slipped and fell on the gravel surface causing lacerations to the face, left hand and left knee" (J. A. 16). No mention was made of a back injury, and, in fact, the police medical examiner found that no treatment whatever was necessary (J. A. 16).

Appellant testified, in response to queries from members of the Retirement Board, that on January 14, 1962, as he was carrying a foot locker down a flight of stairs in his home, he fell and injured himself. When asked whether or not his back was injured in any way by this fall, he replied, "no, sir." (J. A. 39.) However, the record shows that appellant remained off duty for eight days after this mishap, suffering ostensibly from the "grippe" (J. A. 15). In explaining to the Board this absence from duty, appellant said:

" * * * I went up there * * * [to the Police and Firemen's Clinic] for my neck and after, I think, two days I went back and it was down in my back and I was crippled up and I couldn't straighten out. That time, I believe, [Dr. Esch] * * * sent me for x-rays." (J. A. 36.)

Appellant's counsel, by way of further explanation, added that appellant's eight day absence from duty on this occasion "shows on the sick card as grippe" (J. A. 36).

Finally, appellant claimed prior to the hearing before the Retirement Board that his back trouble resulted from the mishap which occurred on November 16, 1960 (J. A. 16, 30). During the hearing, he was asked specifically: " * * * [D]id you ever have any trouble with your back before the first injury [November 16, 1960] you mentioned to us" (J. A. 32)? Appellant, in reply, said "No" (J. A. 32). Yet, upon prompting by his counsel, appellant later recalled that the onset of his back trouble originated from a 1958 mishap when he suffered a "lumbo-sacral strain" (J. A. 33, 36, 55; see also appellant's brief, pp. 7, 17).

In summary, the medical evidence and appellant's testimony as to his disability are in hopeless conflict. The conclusion of the Retirement Board, therefore, which observed, heard, and cross-examined the appellant with respect to his claim of disability, should be accorded great weight.

II

That appellant was granted extra days of sick leave, upon certification that his disability was duty connected, is not sufficiently probative to overcome the earlier finding of the Retirement Board that the disability was not duty connected.

Appellant repeats an oft-made argument in cases of this nature. He argues that because (upon certification by the Board of Police and Fire Surgeons that the disability causing his absence was duty connected (J. A. 26-27)) he was granted extra days of sick leave with pay, a finding is compelled that the Retirement Board erred in holding that his disability was not duty connected (appellant's brief, pp. 19-20).

As the record indicates, the excess sick leave with pay was authorized on March 6, 1963, by the Board of Police and Fire Surgeons (J. A. 26-27) one week after appellant's retirement was ordered (on February 28, 1963) for disability not incurred or aggravated by the performance of duty (J. A. 87). Under these circumstances, it was clearly improper for the Board of Police and Fire Surgeons to certify that his disability was duty connected and to authorize extra sick leave with pay.

The authorization of extra sick leave with pay, in this and similar retirement cases, is nothing more than a humane administrative

practice,⁷ and evidence thereof cannot reasonably be used to impeach the contrary finding of the Retirement Board, which is charged by law with the duty of determining whether disablement was duty connected or not. D. C. Code, Title 1, Reorganization Order No. 31, Part III (1967).

CONCLUSION

In view of the foregoing, it is respectfully submitted that the court below did not err in finding that appellees' determination that

⁷ In King v. Tobriner, et al., No. 19,843, this Court, in an unpublished order dated March 23, 1966, affirmed the order of the District Court disallowing Officer King's claim to retirement for duty-connected disability, notwithstanding a showing that he had previously been granted, upon certification by the Board of Police and Fire Surgeons that the disability was duty connected, 210 days of extra sick leave with pay (see appellant's brief in King, p. 4).

Similarly, in Horrigan v. Tobriner, et al., No. 19,844, also affirmed by this Court in an unpublished order dated March 23, 1966, Officer Horrigan had, under like circumstances, previously been granted 106 days of sick leave with pay (see appellant's brief in Horrigan, p. 4).

Upon the failure of the Board of Police and Fire Surgeons to allow requests for extra sick pay by Officers King, Horrigan, and Cassidy, they would be required to repay to the department the salary which they earned after their regularly authorized sick leave became depleted. The Board's administrative practice in authorizing such extra leave is, therefore, obviously done for humane reasons.

appellant's disability was not incurred in the performance of duty is supported by substantial evidence in the administrative record. The judgment of the court below should, therefore, be affirmed.

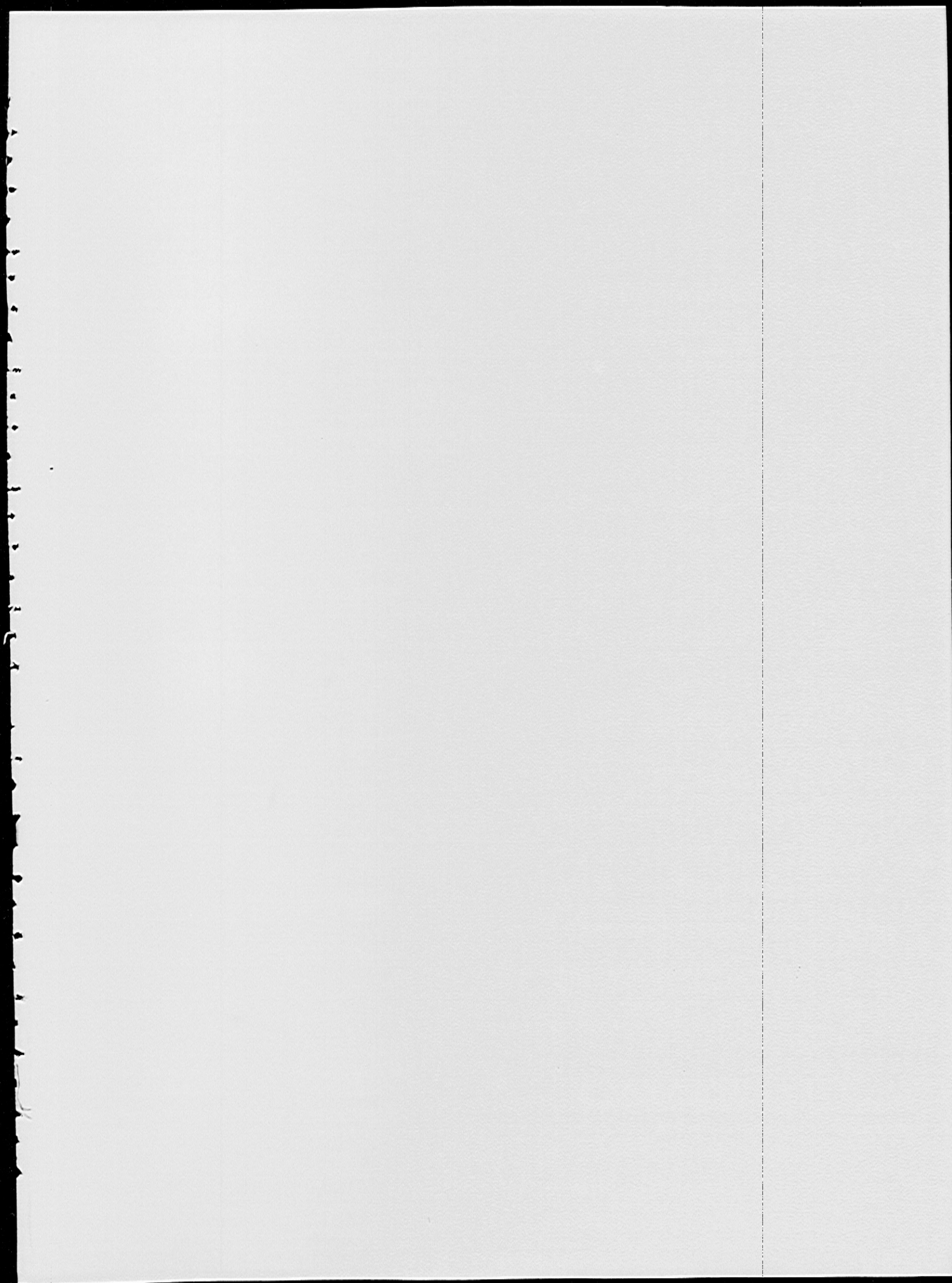
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REPLY BRIEF FOR APPELLANT

In the
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,485

JAMES J. CASSIDY,

Appellant,

v.

WALTER N. TOBRINER, *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

FILED MAR 29 1968

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CITATIONS

CASES:

Blohm v. Tobriner, (1965) 122 U.S. App. D.C. 2	10, 12
Crawford v. McLaughlin, et al., (1960) 109 U.S. App. D.C. 264, 286 F.2d 221	6, 11
Hyde v. Tobriner (1964) 117 U.S. App. D.C. 311, 329 F.2d 879	10, 11, 12
Lovell v. Tobriner (1962) 114 U.S. App. D.C.	12
Souder v. Tobriner (1963) 114 U.S. App. D.C. 267	12

DISTRICT COURT CASES:

Bixler v. Tobriner, C.A. 908-64 (J. Matthews)	11
Carroll v. Tobriner, C.A. 1038-64 (J. Gasch) 253 F.Supp. 87 (1966)	11
Duffy v. Tobriner, C.A. 1575-66	11
Galich v. Tobriner, C.A. 636-65	11
Gibbons v. Tobriner, C.A. 131-62 (J. Hart)	11
Graham v. Tobriner, C.A. 1291-62 (J. Tamm)	11
Harvey v. Tobriner, C.A. 1392-62	11
Lavandowski v. Tobriner, C.A. 1504-64 (J. Matthews)	11
MacDonald v. Tobriner, C.A. 151-64 (J. Curran)	11

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REPLY BRIEF FOR APPELLANT

1. Appellees' Contention that Appellant "Remained Away From Work" is Misleading - On pages 3 and 12 of their brief, appellees contend in substance that, "appellant frequently remained away from work. . ." implying that he remained off from work at his convenience. This is inaccurate in that it is well known that sick leave *must be approved* by the Board of Surgeons and in this case

the sick leave mentioned at the bottom of page 3 of Appellees' brief was actually approved by the appellees as shown at J.A. 26, including forty-four (44) days of excess sick leave in the year 1962. The Police Manual prescribes the procedure to be followed in granting an officer sick leave.

2. Appellees' Brief Page 4 Erroneously Implies That Appellant's Low Back Pain Commenced in 1962 - Here appellees state, "Appellant commenced to complain of recurrent low back pain, which he stated prevents him from performing his duties as a Police Officer and of pain in his 'left knee' (J.A. 23)." In context this quotation seemingly refers back to or is related to page 3, the last paragraph at the bottom and implies that Officer Cassidy's difficulties commenced some time "Beginning in June, 1962."

J.A. 23, the cited source for the above statement, is Dr. Esch's report to the Board of Surgeons dated November 20, 1962 which states that the onset of pain was November, 1960, stating in pertinent part (as of 11/20/62):

"Private James J. Cassidy has been under my professional care since November, 1960. His chief complaints have been pain in his lower back and left knee and generalized fatigue. *He dates the onset of these symptoms to an injury which he incurred in the line of duty on November 16, 1960.* Since that time, he has complained of recurrent low back pain. . . He again injured his back while on duty on July 15, 1961. During the past six (6) months he has lost increasing amounts of time from duty due to this complaint . . . The diagnosis is traumatic arthritis of the lumbo sacral region." (All emphasis supplied) (J.A. 23)

3. Appellees' Brief Pages 5 and 16 Erroneously States that Appellant "Claimed" Inability to Perform Police Duty - On page 5 of their brief, appellees state, "appellant thereafter appeared before the Board and claimed inability to perform police duty on the grounds that he suffered fatigue. . ." (Citing J.A. 37).

It is submitted that appellant was not *claiming* anything. He was merely answering a question of Dr. Cliff which appears at the bottom of J.A. 36 where Officer Cassidy was asked in part, "What is your chief difficulty now?" In response thereto he stated in part, at the top of J.A. 37, "Anything seems to bother my back."

On page 17-18 of their brief, appellees refer to appellant's injury of November 16, 1960 as having "*alleged* to have occurred." This incident did occur and was witnessed by another officer (Private William B. Corcoran) and was *certified* by their commanding officer as incurred "on duty and in the actual performance of duty." (J.A. 16).

4. Appellees' Brief Pages 5 and 18 Erroneously Urges that Appellant on January 14, 1962 Fell Down a Flight of Stairs in his Home as He Was Carrying a Foot Locker and He Injured Himself, as This Incident Occurred on January 14, 1952 - On pages 5 and 18 of their brief, appellees state, "In response to queries by the Retirement Board, appellant testified that on January 14, 1962, as he was carrying a foot locker down a flight of stairs in his home, he fell and injured himself." (Citing J.A. 39). This referred to the question asked by Deputy Chief Embrey, "In January 14, 1962, carrying a foot locker downstairs, he fell and grabbed a hand rail and hurt his hand. Did you hurt your back at that time?"

Appellees' counsel has either disregarded, overlooked or has not read the explanation contained in appellant's brief at page 6 regarding this obvious error of *date* where it is clearly demonstrated that this incident did not occur on January 14, 1962, but on January 14, 1952. (This was probably an error in transcription—note similarity in sound of "fifty-two" and "sixty-two".)

This is the entry of 1/16/52 which appears on appellant's master sick leave card, (J.A. 14) referring to a "Fracture of the 5th

metacarpal, right *hand*", and is the same incident referred to at J.A. 69 near the bottom where Dr. Shapiro stated, "A review of his Master Sick Card shows that he lost nine (9) days in January, 1952, for a fracture of the 5th metacarpal, right *hand*."

Appellant's first treatment for back trouble was on 4/4/58 more than 6 years later—"L. S. Strain" (J.A. 14) previously mentioned.

5. Appellees' in Their Brief Pages 5 and 18-19 Erroneously Contend that Appellant's Absence From Work in January, 1962 Was Due to "Grippe" - Here appellees state, "However, the record indicates that appellant remained away from duty on that occasion eight (8) days, suffering ostensibly from 'grippe' (J.A. 15)." (This point is related to point No. 4 above).

For an explanation that this entry of "grippe" is an error, see appellant's brief page 3 and see also in this regard J.A. 64 where Officer Cassidy testified that this was the occasion when Dr. Bailey came to his home for one of his severest attacks. "I couldn't straighten up or get out of bed." It was brought out that the entry was "grippe" and then Cassidy was asked the question "Did you have grippe at that time," and he testified that "it hit me in the back and I doubled up."

Dr. Mensh explained how this was probably erroneously entered as "grippe," stating in part, "The man had a backache so it could be grippe. In this instance it could be important if he had written down an acute lumbar back pain, line of duty" (J.A. 64), Dr. Mensh concluded at that time indicating the extreme difficulty if not impossibility which clinic doctors experienced in keeping accurate and full records because of time limitations when he stated (J.A. 64):

"I am not trying to tell you my own problems, but I will guarantee that yesterday I had 35 phone calls (patients?). Everyone should be written up and put in as a matter of record. It is impossible to do."

This back difficulty was also mentioned at J.A. 36 near the bottom of the page where Officer Cassidy testified about this incident before the Retirement Board.

It was further mentioned at J.A. 70 where Dr. Shapiro's report dated February 8, 1963 (J.A. 67) was read stating in part:

"His *surgical file* shows he was seen by Dr. Harrell on January, 1962, with a history of being off nine (9) days in July, 1961, for lumbar-strain under Dr. Esch. 'Present episode started at home 1/16/62 so acute he couldn't stand. Today he can't straighten. No radiation. Points to C-4 no tenderness. No radiation. Lists to right but can't bend left. Bends forward with acute distress. . .' (emphasis supplied)

6. Appellees' in Their Brief Page 6 Speculate that Appellant's Lifting Electric Motors, Etc. Caused His Back Trouble - At page 6 of Appellees' brief, it is stated, "Between March and July, 1962, appellant performed outside employment which required him to lift and carry electric motors weighing as much as forty (40) pounds. (J.A. 47-49). He admitted to the Retirement Board that, during the summer of 1962, he engaged in such physical recreation as swimming and badminton (J.A. 49)."

Appellees urge in substance that appellant engaged in much activity in this regard. Actually the testimony is to the contrary, indicating in substance that this officer was actually *discharged* from his outside job relating to refrigeration work *because he could not lift heavy objects* and that normally the motors were brought in (by others) and he either cleaned them on the floor without lifting them to the bench or *others* would put them on the bench where he would work on them. He further stated that his swimming and badminton was very slight and occurred on his vacation. His testimony in part was as follows: (J.A. 48)

"Well, July the man let me go because I couldn't do any lifting, and he felt as though he was training me for refrigeration work and he said he had no inside work and would have to let me go. . . . Well, he had a lot of heavy equipment. For instance, he had these two, three ton units which I felt as though I couldn't lift and he wanted me to go out on jobs and he felt as though I couldn't do it so he let me go. . . . I cleaned up the units, but I couldn't go out and work on some jobs. . . (At J.A. 49). They would bring them in and leave them on the floor, and I would clean them on the floor. All the others, they would have on the bench, but most of the big units, 3 ton, 5 ton units they would bring it in and park it there and I would clean it. . .

Q. After you finished, you would move it?

A. No, sir. They took them out. . . . Well, I suppose swimming when I went on my vacation this summer a little badminton. That is about all."

Appellees' arguments in this regard attempting to attribute appellant's back difficulty to his outside work are reminiscent of the quotation from *Crawford v. McLaughlin, et al*, 109 U.S. App. D.C. 264, 286 F.2d 221, where the Court stated in part as follows:

"We find no evidence that the disabling condition grew out of any injury received or disease contracted other than in the performance of duty. In the face of the evidence to which we have referred, tracing the condition to an injury received in the performance of duty, it would be too speculative to infer that the condition which had manifested itself prior to the carpentry and other extra work was due to that work."

7. Appellees' Brief Pages 6-7 and 14-15 Gives Erroneous Impressions of the Results of the Examinations by Drs. Shapiro and Radice - At the bottom of page 7 of their brief, Appellees state "Thus neither Dr. Shapiro nor Dr. Radice found evidence to indicate that appellant was suffering from traumatic arthritis inferring that neither doctor found anything abnormal. This statement is misleading in that Dr. Shapiro was *not* examining for *arthritis* as shown at J.A. 67 where his report stated "Private Cassidy was referred to the undersigned. . .for *neurologic* and *psychiatric* evaluation." The Retirement Board had referred the officer back to the Board of Surgeons to obtain an opinion from Dr. Shapiro, a neuro-psychiatrist, as to whether there was any "neurological or psychiatric condition present." Dr. Shapiro's diagnosis was limited to "no evidence of neurologic or psychiatric disease" and was *not concerned* with *arthritis*.

On page 7 of their brief, appellees quote a portion of the report of Dr. Radice who concluded with the diagnosis of "mild arthritic changes." That portion of Dr. Radice's report which is quoted appears at J.A. 73, however, the immediately preceding paragraph which appears at the top of J.A. 73 (which appellees omitted) indicates that Radice *did find some objective evidence* of injury where it is stated (J.A. 73):

"On physical examination, on standing, there was a little *dorsal kyphosis* (i.e. abnormal curvature of the spine). Some *straightening of the lumbar spine* was noted (i.e. abnormal). Slight *paravertebral muscle tightness* was present . . ." (Emphasis supplied)

Dr. Mensh also testified:

(1) that a person can have *subjective* pain without *objective* evidence of injury, etc. (J.A. 73-74);

(2) That Drs. Shapiro's and Radice's reports are *not inconsistent* with the findings of Dr. Esch's report (and his diagnosis of "traumatic arthritis lumbo-sacral region" J.A. 29). Note that at J.A. 24 the Board of Surgeons as a whole concurred in this finding "arthritis lumbo-sacral spine" and "Retirement - Disability" (J.A. 74);

(3) that the *diagnosis of traumatic arthritis* indicates that it was a *result of the trauma* of an injury (J.A. 76);

(4) that it was significant to the Board of Surgeons that the man had no *symptoms before November 19, 1960* (when he was injured training a dog) and that he had had symptoms since then (J.A. 79);

(5) that if the officer had such a condition (arthritis lumbo-sacral spine) it *would be aggravated* by police duty (J.A. 79-80);

(6) that he did not agree that this officer was "without objective evidence of physical disability" when he stated "he *does have* changes by x-ray" (J.A. 81).

8. Appellees' Brief Page 7 and 15 Leaves Erroneous Impressions Regarding Dr. Mensh's Testimony About Many People Having Arthritic Changes Without Symptoms - On Pages 7 and 15, footnote 6, of their brief, appellees urge that Dr. Mensh testified that "Millions of people" manifest arthritic changes without suffering physical disability. (Citing J.A. 73, 80). It is fairly common knowledge that the majority people over 35-40 years of age have arthritic changes many, if not most, *without symptoms*. It is also well known in the medical circles that often these changes do not produce symptoms or pain until a *trauma* occurs. Officer Cassidy experienced such a trauma on four different occasions, namely in 1958, 1960, 1961, and 1962.

9. Appellees Erroneously Urge, on Pages 8 and 22 of Their Brief, That There is Substantial Evidence to Support Their Determination that Appellant's Disability Was Not Incurred in the Performance of His Duties as a Police Officer - It is conceded and not disputed that the appellant was disabled for duty or otherwise he would have not been retired for disability on any basis. The only question before the Retirement Board was whether this disability was incurred in the performance of duty or aggravated by duty. A question which appellees must answer is "Where in the record is there *any medical* testimony that Officer Cassidy's disability was caused (or aggravated) by anything other than duty. Thus there is *no* medical evidence of causation of appellant's disability by other than duty factors much less substantial evidence to support the finding of the Retirement Board.

10. Appellees Erroneously Infer that Appellant "Applied" for Disability Retirement - On page 8 of their brief appellees refer to the "applications for disability retirement by members of the Metropolitan Police Department." As heretofore shown, Officer Cassidy *did not apply* for retirement, but he was *directed* to appear before the Board of Surgeons for physical examination in connection with his contemplated retirement (J.A. 20). He was *ordered* to appear on Tuesday, November 20, 1962 for said examination (J.A. 21) and he was *directed* to appear before the Retirement and Relief Board (J.A. 22).

11. Appellees' Reliance Upon the Sentilles Case Is Misplaced for Many Reasons - In their brief pages 10-12, appellees refer to *Sentilles* case claiming in substance that this Court cannot legally overturn the findings of the Retirement Board. The quotation in their brief, page 11 referring to the "conclusion drawn by the *jury*" etc. are not applicable here because the instant case was not before a jury and judge but before the Retirement Board made up of four

laymen and a legal member who in the instant case was Layman Umstead, an Assistant Corporation Counsel attached to the Litigation Section of the Corporation Counsel's office which is the same section which supplied the legal counsel to defend these retirement cases in the Courts which circumstances might make it difficult to remain completely objective (J.A. 28, 65).

Also a retirement case is not an ordinary civil action as shown by the *Hyde* case, 117 U.S. App. D.C. 312, (a retirement case) which is stated: "Accordingly the evidence must be viewed in a light more favorable to the applicant. . .than in the usual type of civil action."

Appellees also urge on page 11 of their brief, that it can be inferred that appellant's disability resulted from a fall which occurred while he was off duty, or from his private employment. Since "the department had the burden" as ruled in the *Blohn* case, certainly there was insufficient evidence of a *lack of connection* between appellant's disability and performance of duty to have submitted this question to a jury (had this been a civil jury negligence trial) because as previously noted, there was *no medical evidence* that appellant's condition was related to anything other than duty.

On page 11 of their brief, appellees also refer to "the medical proof." It should not be overlooked that *Dr. Esch*, who had this officer under his care for about 2 years and made the diagnosis of "traumatic arthritis lumbo-sacral spine" (J.A. 23) and the *Board of Surgeons* (J.A. 24) *as a whole* which found the appellant to be suffering with "arthritis lumbo-sacral spine" (J.A. 24) are all physicians under the control and supervision of the appellees and the officer has little, if any, opportunity to discuss their testimony before the Retirement Board.

The Retirement Board and the Commissioners have been reversed, by the Courts, on many occasions.- The Retirement Board, which as indicated above is made of mainly non-lawyers, who, it is urged, are not particularly well versed in the applicable law, and the appellees have been reversed in retirement cases on many occasions, including, among others, in the *District Court*, the cases of *Graham v. Tobriner*, C.A. 1291-62 (J. Tamm), *Gibbons v. Tobriner*, C.A. 131-62 (J. Hart), *Carroll v. Tobriner*, C.A. 1038-64 (J. Gasch) (affirmed without opinion in favor of officer on appeal by commissioners, 253 F. Supp. 87 (1966)), *Bixler v. Tobriner*, C.A. 908-64 (J. Matthews), *Lavandowski v. Tobriner*, C.A. 1504-64 (J. Matthews), *MacDonald v. Tobriner*, C.A. 151-64 (J. Curran).

In other cases, after suit was filed the commissioners have reversed themselves after *remand* to them, such as in *Harvey v. Tobriner*, C.A. 1392-62, *Galich v. Tobriner*, C.A. 636-65, *Duffy v. Tobriner*, C.A. 1575-66.

The Crawford and Hyde Cases Both Involving Arthritis Support Appellant's Contentions - In the very similar police retirement case of *Crawford v. McLaughlin*, 109 U.S. App. D.C. 264, 286 F.2d 821, (1960) (reversing the Retirement Board), the officer had been ordered retired for disability not incurred in line of duty on August 24, 1959, the issue was whether the officer's "chronic lumbo sacral strain" was incurred in line of duty, Judge Fahy speaking for the Court stated at page 264:

"The evidence we think traces this condition to a fall of appellant on an icy pavement in making an arrest in 1950"

Likewise, in the instant case, Officer Cassidy's condition can be traced to the fall which occurred on November 16, 1960 while running for a dog on the attack (JA 16) or to the fall on July 15, 1961 when he jumped over a fence with a police dog at the scene of a

yoke robbery and fell and injured his back which was diagnosed as an "acute lumbo sacral strain", or to one of his other injuries or to a combination of them, if it be necessary to trace his condition to any specific incident.

The case of *Hyde v. Tobriner*, 117 U.S. App. D.C. 311, 329 F.2d 879 (1964) (which reversed the Retirement Board) involved the question of whether the officer's *arthritis* was caused or aggravated by performance of duty. The most favorable medical evidence to the officer by a member of the Board of Surgeons was that, "The officer's arthritis was caused by *or* aggravated by his duties." (emphasis supplied) The case was decided under D. C. Code, Section 4-527 as it existed before the liberalizing 1962 amendment. Judge Fahy, speaking for the Court on the question of causal connection denied effect to an outside consultant's contradictory opinion (Dr. Crain) stating at 117 U.S. App. D.C. 312, footnote 1:

"The statement of one doctor in 1959, in a letter to another, appearing in the record, that appellant was suffering from 'early osteoarthritis incident to his age' does not countervail the evidence that appellant's disease was incurred in the performance of duty."

In a number of other cases where the District Court sustained the Retirement Board and the Commissioners, this Court has reversed, including, among others, *Souder v. Tobriner* (1963) 114 U.S. App. D.C. 267; *Blohm v. Tobriner* (1965) 122 U.S. App. D.C. 2. In *Lovell v. Tobriner* (1962) 114 U.S. App. D.C. 65, after the District Court had sustained the Retirement Board and Commissioners, this Court *remanded* the case to the Commissioners, who thereafter reversed themselves and granted the officer the relief requested in the suit.

Of course, there have been other cases where the Courts have sustained the Retirement Board and the Commissioners, but the above citations indicate that it is not an uncommon occurrence for

the Courts to correct errors in retirement cases, such as it is submitted, exist in this case.

12. Appellees' Arguments that Appellant Did Not Have "Rheumatoid Arthritis" and His X-rays Were Negative for Fracture or Dislocation Are of Little Value - On page 13 of their brief appellees urge that appellant was not found to have "rheumatoid arthritis" which was determined after a series of diagnostic tests. It is submitted that Dr. Esch's finding of "*traumatic* arthritis lumbo-sacral spine" is a much stronger indication that appellant's disability was incurred in the line of duty than a diagnosis of *rheumatoid* arthritis would have been because *traumatic* arthritis, as Dr. Mensh testified, indicates that it was caused by a *trauma* (or blow). The fact that the lumbo-sacral spine X-ray revealed "no evidence of fracture or dislocation" as cited in appellee's brief, page 13, does not negative in any manner that Officer Cassidy was not suffering from "traumatic arthritis of the lumbo sacral spine" as found by Dr. Esch.

13. Appellees' Contentions Regarding Appellant's Excessive Sick Leave Are Erroneous - In point II, pages 20-21 of their brief, appellees urge in substance that the granting of excessive sick leave which was approved by the Board of Surgeons on May 18, 1963, after the decision of the Retirement Board was improper.

Even if this were so, it would nevertheless clearly show the opinion of the Board of Surgeons that the condition necessitating the sick leave was incurred or aggravated in the line of duty. It is also shown by J.A. 26-27 that this excessive sick leave was "*Approved* by the Commissioners of the District of Columbia Sitting as a Board, March 19, 1963." Also this case was not finally determined by the appellee commissioners until February 12, 1964 (J.A. 89). Appellant urges that at the very least this is an extremely strong admission by the appellees that his disability was incurred in the line of duty as previously recognized by this Court on many occasions as reflected in appellant's brief pages 19-20.

CONCLUSION

The appellees have failed to sustain the burden of proving that appellant's disability, which was conceded to exist, was causally related to something other than duty, as required by the *Blohm* case, and appellant should be ordered retired for disability incurred or aggravated in the performance of duty in accordance with the "humane purpose" of the retirement laws.

Respectfully submitted,

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